SUPREME COURT OF THE UNITED STATES
October Term, 1995

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

ROBERT DRISCOLL,
A State Prisoner Under Capital Sentence,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether respondent is entitled to a writ of habeas corpus under 28 U.S.C. § 2254(d) (approved April 24, 1996) where the state courts' resolution of respondent's claims was reasonable?

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No. 95-_____

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---

OPINIONS BELOW

The Panel Opinion of the United States Court of Appeals for the Eighth Circuit granting the writ of habeas corpus is reported at 71 F.3d 701 (8th Cir. 1995), and is published in the Appendix at A-1. The Order of the district court granting the petition for writ of habeas corpus is not reported, but is published in the Appendix (A-35). Likewise, the Magistrate's Report and Recommendation is not reported, but it is also published in the Appendix (A-39).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on December 4, 1995 (A-1). The petition for rehearing or rehearing *en banc* was denied by the Court of Appeals on February 1, 1996 (A-155). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rules 13.1 and 13.3, the present petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section one of the Fourteenth Amendment to the United
States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property without due process of law . . . .

28 U.S.C. § 2254(d) (Approved April 24, 1996) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Eleven and a half years ago, a jury found respondent, Robert Driscoll, guilty of capital murder, § 565.001, RSMo 1978 (repealed 10-1-84) in the Circuit Court of Phelps County, State of Missouri. The jury recommended that he receive capital punishment. The trial court sentenced respondent accordingly.

At respondent's trial, the evidence adduced by the State showed the following:

> In July of 1983, respondent was an inmate at the Missouri Training Center for Men, a medium-security correctional institution located in Moberly, Missouri (Tr. 789, 797, 903-04). Respondent resided in Housing Unit 2, an X-shaped building consisting of four wings of cells (designated A-D) and a central rotunda, where the security of the wings was policed from a circular desk called the "control center" (Tr. 791-93, 903-04). The rotunda was separated from the wings by a glass partition so that the officers at the control center could observe the inmates, and a door led from the rotunda into each wing (Tr. 829-30). On the evening of Sunday, July 3, there were a total of 459 inmates in Housing Unit 2, and three correctional officers were assigned to that building (Tr. 795).
>
> During the evening of July 3, a number of inmates in the "B" wing of Housing Unit 2--where respondent's cell was located--were drinking "hooch" (homemade wine) that

had been secretly made in violation of prison regulations (Tr. 802, 903-04, 912, 1124-25). The "hooch" was being distributed from a cell occupied by respondent and Jimmy Jenkins (Tr. 904-05, 911-12, 953). This activity was noted by the guards on duty, and sometime around ten o'clock p.m., Correctional Officer Thomas Jackson went into the wing to bring out Inmate Jenkins (Tr. 904-05, 1125). Jenkins refused to comply with Jackson's order to accompany him, and the unarmed officer returned to the control center (Tr. 843, 905, 1010, 1125). At this time, a request for assistance was made to the watch officer in charge of the institution, and five additional guards arrived at housing Unit 2 (Tr. 826-27, 854, 981-82, 1010, 1021). Shortly after Officer Jackson left B wing, respondent assembled a homemade knife, which he had hidden in his cell, and concealed it in the back of his pants (Tr. 905-06).

When the additional guards had arrived at Housing Unit 2, three officers (Assistant Watch Officer Donald Kroeckel, Kenneth Goodin and Thomas Jackson) were sent into B wing to get Inmate Jenkins (Tr. 826-28, 854, 1021-22). As they did so, a mob of some twenty to thirty inmates, including respondent, was forming at the far end of the wing (Tr. 908, 982, 1040-41). The inmates were shouting "[y]ou're not taking Jimmy anywhere" and "[l]et's rush them" (Tr. 908, 955, 957, 982-83, 1040). Officers Kroeckel and Goodin escorted Jenkins back to the control center with Officer Jackson following

some ten feet behind (Tr. 830-31, 1022). Just as Jenkins and his two escorts passed through the door into the rotunda and reached the control center desk, respondent and other inmates rushed Officer Jackson (Tr. 831, 834-35, 855, 908, 983, 1022-23, 1041). Before Jackson could reach the door to the rotunda, he was grabbed by a 300-pound inmate named Roy "Hog" Roberts and was pinned to the glass partition next to the door (Tr. 855-57, 878, 884-90, 940, 984, 1026). Using the knife he had concealed in his pants, respondent stabbed Officer Jackson several times in the chest (Tr. 909-10, 913, 1023, 1042-43). The stab wounds entered Jackson's heart and lungs, and a large quantity of blood appeared on the victim's shirt (Tr. 858-59, 1006-07, 1025, 1075-79, 1082, 1131). While Officer Jackson was being stabbed by respondent, several other officers standing on the rotunda side of the partition tried to reach through the door and pull the victim to safety (Tr. 858-59, 873-74, 972-73). These officers were beaten back by other inmates, and one of the guards, Harold Maupin, was stabbed in the shoulder by respondent (Tr. 859, 973, 976, 1206-07). After the rescue attempts had been repelled, another inmate named Rodney Carr stabbed Officer Jackson once more in the abdomen (Tr. 872-73, 880, 986-88, 1004, 1024-26, 1074, 1080, 1127-29, 1145-47). A few seconds later, Officer Jackson's body was pulled away from the inmates and into the rotunda by several guards (Tr. 859-60, 988-89, 1004-05). The cause of his death was the

stab wound by respondent which penetrated the heart (Tr. 1082).

In the course of the murder of Officer Jackson, a number of other inmates entered the rotunda and fought with the guards around the control center (Tr. 835-38, 879-80, 983-84, 1011-13, 1023, 1043). Rodney Carr had stabbed a guard in the rotunda before he assaulted the victim (Tr. 879-80, 984-87), and he stabbed a third correctional officer immediately after the murder of Jackson (Tr. 952-53, 989, 1013, 1023-24). The inmates were eventually cleared from the rotunda, but they continued to resist the officers in wing B, and inmates from two other wings began to break through the glass partition into the rotunda (Tr. 848-50, 864-65, 892, 992). Order was restored only after shotguns were fired down the wings to clear out inmates who refused to return to their rooms (Tr. 841-43, 849-50, 865, 892-94, 992-94). As respondent ran to his cell to avoid shotgun fire, he told Inmate Jenkins, "I killed the freak" (Tr. 1132, 1147). Inside his cell, respondent changed his clothes (Tr. 922-23). While doing so, he said to another inmate, Joseph Vogelpohl, "[d]id I take him out, JoJo[,] or did I take him out?" (Tr. 922-23). The prison pants taken off by respondent were later seized and were found to have blood matching that of Officer Jackson on them (Tr. 923-24, 1193, 1205-06).

On the afternoon of the next day (July 4), after being advised of and waiving his Miranda rights (Tr. 1226-31, 1269),

respondent admitted to a highway patrol officer and prison investigator that he had stabbed a correctional officer during a riot (Tr. 1257-60). Several weeks later, while at the Missouri State Penitentiary with Inmate Jenkins, respondent directed Jenkins to testify to a false story to the effect that respondent had acted in self-defense (Tr. 1134-35). On the day he was to be transported to Phelps County for trial, respondent was found to have a knife wrapped in gauze inserted in his rectum and a homemade handcuff key in his stomach (Tr. 369, 1110-20).

Respondent did not testify, but he called twenty-five witnesses (including twelve inmates) in an attempt largely to impeach the State's witnesses (Tr. 1290-1809). Of the witnesses originally called by the defense, a total of three claimed to have any personal knowledge concerning the murder of Thomas Jackson (Tr. 1307-1430). At the close of the evidence, instructions and arguments of counsel, the jury found respondent guilty as charged of capital murder [Direct Appeal Legal File--hereinafter--D.A.L.F. 909]. In the punishment phase of trial, the State introduced respondent's seven prior felony convictions: two robberies, two burglaries, two felonious thefts and forgery [D.A.L.F. 870-71]. The State also adduced evidence as to respondent's reputation for violence (Tr. 2006-43). Respondent testified in purported mitigation of his offense (Tr. 2050-92). The jury recommended a sentence of death, finding, as a basis for consideration of capital

> punishment, that respondent had a substantial history of prior assaultive convictions, § 565.012.2(1), RSMo Cum. Supp. 1983 (repealed effective 10-1-84); that the victim was a corrections employee engaged in the performance of his official duty, § 565.012.2(8), and that respondent was in the lawful custody of a place of confinement, § 565.012.2(9) [D.A.L.F. 923].

[State of Missouri's Direct Appeal Brief--State's Exhibit D before the district court, pp. 3-8.] Respondent appealed his conviction and sentence to the Supreme Court of Missouri, which affirmed (A-117). State v. Driscoll, 711 S.W.2d 512 (Mo. banc), *cert. denied*, 479 U.S. 922 (1986).

Respondent filed his *pro se* postconviction relief motion in state circuit court on November 14, 1986 (27.26 Legal File--hereinafter "27.26 L.F," State's Exhibit F before the district court--at 1-10). After amendments (27.26 L.F. 13-43), the circuit court held an evidentiary hearing on April 24, 1987. On June 22, 1987, the circuit court issued findings of fact and conclusions of law denying Rule 27.26 relief (27.26 L.F. 44-75). Respondent appealed the denial of relief, however, the Missouri Supreme Court affirmed the denial of relief (A-130). Driscoll v. State, 767 S.W.2d 5 (Mo. banc), *cert. denied*, 110 S.Ct. 21 (1989).

Federal litigation ensued when, on October 5, 1989, respondent filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 before the United States District Court for the Eastern District of Missouri. Respondent filed an amended petition, and the State filed a responsive pleading. Twenty-two months later, the district court referred the cause to a United States Magistrate. Respondent filed a traverse, and fourteen months later, the magistrate issued the report

and recommendation (A-39). After objections, the United States District Court, the Honorable George F. Gunn, Jr., entered an order adopting the magistrate's report and recommendation and granting the petition for writ of habeas corpus (A-35). Respondent appealed, and respondent cross-appealed. The United States Court of Appeals for the Eighth Circuit affirmed in part and reversed in part (A-1). The appellate court directed the district court to vacate respondent's conviction and sentence and ordered him released unless the State began proceedings to retry him within 120 days (A-33). The present petition for certiorari ensues.

ARGUMENT

Whether respondent is entitled to a writ of habeas corpus under 28 U.S.C. § 2254(d) (approved April 24, 1996) where the state courts' resolution of respondent's claim was reasonable?

Since the court of appeals' December 4, 1995 decision, affirming in part the district court's grant of habeas relief, Congress passed, and the President signed, the Anti-terrorism and Effective Death Penalty Act of 1996, reforming the federal habeas corpus statutes. *See* The Anti-terrorism and Effective Death Penalty Act of 1996, Title I--Habeas Corpus Reform (A-158). Under Revised 28 U.S.C. § 2254(d), respondent is entitled to no habeas corpus relief. This Court should exercise its discretion and grant a writ of certiorari so that it can give guidance to the lower courts in the application of 28 U.S.C. § 2254(d). Alternatively, the Court may exercise its discretion by granting a writ of certiorari and remanding the cause to the court of appeals with directions that it remand the cause to the district court in order for the district court to apply the new provisions. Cf. Nave v. Delo, 115 S.Ct. 1086 (1995) (remanding to Court of appeals for further consideration in light of Schlup v. Delo, 115 S.Ct. 851 (1995)). Either course is worthy of the Court's discretion under Supreme Court Rule 10.

The Court recently invited Congress to reconsider the statutory provision concerning the writ of habeas corpus. *See* Lonchar v. Thomas, 64 U.S.L.W. 4245, 4249, 4249 (U.S. Apr.1, 1996) (No. 95-5015). Meanwhile, Congress revised the statutes concerning the writ of habeas corpus. Since there is no explicit effective date in the legislation, it became effective on the date it was signed into law by the President. United States v. York, 830 F.2d 885, 892 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988). Since the habeas reform

provisions regulate secondary rather than primary conduct, they should be applied retroactively. Landgraf v. USI Film Products, 114 S.Ct. 1483, 1502 (1994).

In the present case, the relevant reform occurred with the revision of 28 U.S.C. § 2254(d). The revised statute requires the federal courts to defer to a state court's determination of the merits of a prisoner's claim unless (1) the state court's adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court or (2) the state court's adjudication of the claim resulted in a decision that was based on an unreasonable fact-finding in light of the evidence presented in the state-court proceeding. Neither the court of appeals nor the district court applied these provisions in resolving respondent's petition for writ of habeas corpus. The Court may wish to exercise its discretionary jurisdiction to reverse the judgment of the lower court and remand for further proceedings in light of the newly adopted 28 U.S.C. § 2254(d).

Alternatively, the Court may wish to exercise discretionary review to provide guidance concerning the scope of 28 U.S.C. § 2254(d). Petitioner believes that Congress intended for a habeas applicant to meet a high standard before relief could be given by a federal court on a claim already adjudicated in state court. The purpose of creating the high standard was to balance the relationship between the federal and state judiciaries. Accordingly, a habeas applicant is entitled to a writ of habeas corpus when his claim was adjudicated on its merits by the state court only if that adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court or that adjudication was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). In the present case, respondent is unable to

demonstrate an exception to the deference requirement of 28 U.S.C. § 2254(d).

The court of appeals found the grant of habeas corpus relief under 28 U.S.C. § 2254(a) proper for three reasons. In light of the modifications to 28 U.S.C. § 2254(d), the court of appeals' judgment is erroneous.

The first ground for relief was a claim that respondent received ineffective assistance of trial counsel from counsel's handling of serology evidence (A-8 to A-17, Driscoll v. Delo, 71 F.3d 701, 706-09 (8th Cir. 1995)). The Supreme Court of Missouri examined respondent's Sixth Amendment claim in detail and found it meritless (A-132 to A-135, Driscoll v. State, 767 S.W.2d 5, 7-8 (Mo. banc 1989)). The Supreme Court of Missouri examined respondent's Sixth Amendment claim using the familiar standard set forth by this Court in Strickland v. Washington, 466 U.S. 668 (1984) (A-131, Driscoll v. State, 767 S.W.2d at 7). Applying the Strickland standard, the Supreme Court of Missouri found neither breach of duty by counsel nor resulting prejudice.

> The hearing court found that although Driscoll's trial counsel did not cross-examine Kwei Lee Su regarding the antibody test performed on the knife, the cross-examination did make known to the jury the fact that the antigen test did not disclose Officer Jackson's blood on the knife.
>
> The hearing court further found that there was no evidence that the state withheld the results of any test performed on the knife. The conclusion reached by the hearing court was that Driscoll was not prejudiced by trial counsel's failure to present evidence regarding the antibody test and, "in view of all of the evidence presented at trial it is unlikely that testimony regarding the antibody test would have affected the outcome of the trial."
>
> Other evidence at trial included two eyewitnesses who testified that they saw Driscoll stab Officer Jackson, evidence that Officer Jackson's blood was found on clothing which Driscoll discarded in his cell after the stabbing, and, incriminating statements by Driscoll.

[A-134, Driscoll v. State, 767 S.W.2d at 8.]

Given the reliance by the Supreme Court of Missouri on this Court's decision in Strickland v. Washington, respondent cannot colorably contend that the Supreme Court of Missouri's decision was contrary to clearly established federal law. Furthermore, respondent cannot contend that the state supreme court's decision was an unreasonable application of the Strickland analysis. Undoubtedly, respondent may disagree with the supreme court's analysis, as did the court of appeals (A-8 to A-17, Driscoll v. Delo, 71 F.3d at 709). But, such disagreement is an insufficient basis upon which to grant relief under 28 U.S.C. § 2254(d)(1).

The court of appeals did not find, nor could it find, nor should it find, that the analysis by the Supreme Court of Missouri was unreasonable. Focusing on the prejudice prong of the Strickland standard, the Supreme Court of Missouri found no Strickland prejudice due to the testimony by two eyewitnesses who testified that respondent stabbed the officer, the presence of the officer's blood on respondent's clothing, and respondent's incriminating statement (A-134, Driscoll v. State, 767 S.W.2d at 8). Since the Supreme Court

of Missouri's decision is a reasonable one, the writ of habeas corpus should not issue.

The second ground found by the court of appeals upon which to justify the writ of habeas corpus was another Sixth Amendment claim of ineffective assistance of counsel (A-17 to A-21, Driscoll v. Delo, 71 F.3d at 709-11). Respondent contended that he received ineffective assistance of trial counsel because trial counsel did not impeach the testimony of eyewitness Joseph Vogelpohl. Since the state court's decision is a reasonable one, the court below erred by issuing a writ of habeas corpus.

The Supreme Court of Missouri considered respondent's Sixth Amendment claim and found it meritless (A-145 to A-147, Driscoll v. State, 767 S.W.2d at 13-14). The state court found neither element of a Strickland Sixth Amendment violation because Vogelpohl's earlier statements were not inconsistent (A-147, Driscoll v. State, 767 S.W.2d at 14). The court of appeals said that there was not "fair support" in the record to support the Supreme Court of Missouri's fact-finding under former 28 U.S.C. § 2254(d) (A-18 to A-20, n.5, Driscoll v. Delo, 71 F.3d at 710 n.5). This is an odd conclusion since the Missouri Supreme Court said:

> [The hearing] court further found that the various statements of Vogelpohl were not directly inconsistent "because the term 'took out' in prison slang means 'killed" and the term 'stuck' in prison slang means 'stabbed' and Officer Jackson was killed by stab wounds."
>
> * * *

> . . . The hearing court's determination was not clearly erroneous. The record from the evidentiary hearing supports the hearing court's interpretation of the word "took out" and "stuck." Using those meanings, there was no showing that Vogelpohl had made prior inconsistent state-ments which Driscoll's trial counsel could have used to impeach Vogelpohl's testimony at trial.

[A-147, Driscoll v. State, 767 S.W.2d at 13-14.] There should be no doubt that the Supreme Court of Missouri's decision is not one "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d)(2).

The third ground supporting the issuance of the writ of habeas corpus was an Eighth Amendment claim based on Caldwell v. Mississippi, 472 U.S. 320 (1985) (A-22 to A-28, Driscoll v. Delo, 71 F.2d at 711-12). Since the Supreme Court of Missouri reasonably decided this claim during respondent's direct appeal, respondent is not entitled to a writ of habeas corpus.

During respondent's direct appeal, the Supreme Court of Missouri analyzed his claim under Caldwell v. Mississippi, *supra* (A-119 to A-123, State v. Driscoll, 711 S.W.2d 512, 515 (Mo. banc), *cert. denied*, 479 U.S. 922 (1986)). Accordingly, the state court's resolution of respondent's claim cannot be described as a decision that was contrary to clearly established federal law. 28 U.S.C. § 2254(d)(1).

Likewise, respondent cannot describe the Supreme Court of Missouri's decision as involving an unreasonable application of clearly established federal law. The Supreme Court of Missouri concluded that the statements by the

prosecutor were "a correct statement of the law." There was no Eighth Amendment violation since Caldwell "involved a clearly inaccurate statement of the law" (A-122, State v. Driscoll, 711 S.W.2d at 515). The Supreme Court of Missouri also noted (1) respondent failed to object to any of the statements by the prosecutor, (2) respondent made similar comments for tactical reasons, and (3) the prosecutor and respondent attempted to convey to the venire the seriousness of the responsibility placed upon a jury in a capital case (A-122 to A-123, State v. Driscoll, 711 S.W.2d at 516). The court of appeals declined to discuss the analysis presented by these factors (A-22 to A-28, 71 F.3d at 713). The Supreme Court of Missouri's analysis is a reasonable application of the Caldwell decision. Again, there is no basis for the issuance of the writ of habeas corpus under 28 U.S.C. § 2254(d)(1).

Whether the Court remands the cause for consideration of 28 U.S.C. § 2254(d) by the lower courts or whether the Court takes the opportunity to apply the statute in the present case is a matter of discretion. Respondent is not entitled to a writ of habeas corpus because he had a full and fair opportunity to litigate his claims in the state courts, and those courts made reasonable decisions that those claims were meritless.

CONCLUSION

For the foregoing reasons, petitioner prays the Court issue a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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PETITIONER'S APPENDIX

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8. Title I--Habeas Corpus Reform Provisions of Anti-Terrorism and Effective Death Penalty Act of 1996 ..... A-165

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 94-2993

Robert Driscoll,

Appellee,

V.

Paul Delo,

Appellant.

Appeals from the United States District Court for the Eastern District of Missouri

No. 94-3266

Robert Driscoll,

Appellant,

V.

Paul Delo,

Appellee.

Submitted: September 11, 1995
Filed: December 4, 1995

Before HANSEN, HEANEY, and MURPHY, Circuit Judges.

HEANEY, Circuit Judge.

The State of Missouri appeals and petitioner Robert Driscoll, a/k/a Albert Eugene Johnson, cross-appeals from the district court's order granting Driscoll's 28 U.S.C. § 2254 petition for writ of habeas corpus. For the reasons stated below, we agree that a writ of habeas corpus should issue on three independent bases: (1) Driscoll was denied the effective counsel guaranteed by the Sixth Amendment because his lawyer allowed the jury to retire with the factually inaccurate impression that the victim's blood was possibly on Driscoll's knife; (2) his trial counsel was also ineffective for failing to impeach a state eyewitness using his prior inconsistent statements; and (3) Driscoll's sentence violates the Eighth Amendment because the prosecutor made repeated statements to the jury that diminished the jury's sense of responsibility for its sentence of death.

I. PROCEDURAL BACKGROUND

Driscoll is a state prisoner currently incarcerated at the Potosi Correctional Center in Mineral Point, Missouri. On December 5, 1984, a jury found Driscoll guilty of capital murder in violation of Mo. Rev. Stat. § 565.001 (1978) (repealed effective October 1, 1984) in connection with the stabbing death of a corrections officer, Thomas Jackson, during a prison disturbance.[1] On December 6, 1984, the jury recommended that Driscoll be sentenced to

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[1]Two other inmates, Rodney Carr and Roy Roberts, were also charged and separately convicted of capital murder in connection with the stabbing death of Officer Jackson. Roberts was sentenced to death for his role in restraining officer Jackson while he was fatally stabbed. State v. Roberts, 709 S.W.2d 857 (Mo.), cert. denied, 479 U.S. 946 (1986). Carr was sentenced to life in prison without consideration of parole for fifty years. State v. Carr, 708 S.W.2d 313 (Mo. Ct. App. 1986).

death; thereafter, on February 7, 1985, the state court sentenced him to death by lethal gas. The Missouri State Supreme Court affirmed Driscoll's conviction and sentence on direct appeal. State v. Driscoll, 711 S.W.2d 512 (Mo.), cert. denied, 479 U.S. 922 (1986). Driscoll subsequently filed a motion for post-conviction relief in state court pursuant to Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988), which the trial court denied after an evidentiary hearing. The Missouri Supreme Court affirmed the denial of the motion. Driscoll v. State, 767 S.W.2d 5 (Mo.), cert. denied, 493 U.S. 874 (1989).

On October 6, 1989, Driscoll filed this petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The court appointed counsel to assist Driscoll and on October 22, 1990, Driscoll filed an amended petition asserting the following general claims for relief: (1) he was denied effective assistance of counsel in violation of the Sixth Amendment because of multiple alleged errors on the part of his trial counsel; (2) he was denied due process of law in violation of the Fifth Amendment as a result of multiple trial court errors; (3) Driscoll's grand and petit jury pools did not represent fair cross sections of the community in violation of due process; (4) the Missouri death penalty statute is unconstitutional because it affords the prosecuting attorney unbridled discretion to seek the death penalty in a discriminatory manner; and (5) numerous other claims under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

The district court referred all pretrial matters to the magistrate judge. After conducting a de novo review of the record, including consideration of the parties' objections to the magistrate judge's report and recommendation, the

district court adopted the report of the magistrate judge and granted Driscoll's habeas corpus petition on July 8, 1994.

The district court found seven distinct bases on which it granted petitioner habeas corpus relief: four instances of ineffective assistance of counsel and three instances of due process violations.[2] The court determined that Driscoll received ineffective assistance of counsel because his trial counsel (1) did not adequately prepare for the introduction of blood identification evidence at trial and failed to adequately cross-examine the state's serology expert on the crucial issue of blood identification testing methodology, (2) failed to adequately cross-examine a state eyewitness regarding prior inconsistent statements, (3) failed to object to repeated statements by the prosecutor to the jury that minimized the jury's sense of responsibility in recommending a sentence of death, and (4) did not request a jury instruction on the lesser-included offense of second degree felony murder. In addition, the court determined that a writ of habeas corpus was warranted because Driscoll's trial was tainted by the following due process violations: (1) the court's failure to curtail, sua sponte, the prosecutor's repeated statements to the jury that minimized the jury's sense of responsibility for recommending a sentence of death; (2) the court's failure to instruct the jury,

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[2]The district court either dismissed or rejected the rest of Driscoll's claims. Many claims in Driscoll's petition had been extinguished due to procedural default unexcused for cause. The district court denied the remainder of his claims on their merits. After carefully reviewing the full record on appeal, we affirm the district court's judgment with respect to these claims. In so doing, we thereby reject the claims raised by Driscoll in his cross-appeal.

sua sponte, on the lesser-included offense of second degree felony murder; and (3) allowing the state to offer improper rebuttal testimony.

We will consider each of these grounds in turn after a recitation of the factual background necessary to reach our determination.

II. FACTUAL BACKGROUND

Driscoll was convicted of capital murder and sentenced to death for his role in the stabbing death of Officer Tom Jackson at the Missouri Training Center for Men (MTCM) in Moberly, Missouri on July 3, 1983. Driscoll was one of the 459 prisoners housed in Unit 2, an X-shaped building consisting of four cell wings (designated "A" through "D") branching from a central rotunda where guards monitored security from a circular desk called the control center. Reinforced glass doors secured the rotunda from the housing wings and provided the only entrance to and from each cell wing. Because MTCM is a medium-security institution, each inmate is permitted to keep a key to his cell and can generally move freely within his wing.

Beginning during the day of July 3, 1983 and continuing into the night, inmates in Unit 2B were drinking homemade alcohol and smuggled, store-bought whisky. The center of this activity, cell 2B-410, housed Driscoll and his cellmate, Jimmie Jenkins. Officer Jackson was one of three guards assigned to monitor security in Unit 2 that night. By regulation, Jackson was unarmed. By nighttime, Jenkins had become exceedingly disruptive. At approximately 9:45 p.m., Officer Jackson entered Unit 2B to remove Jenkins from the wing. Jenkins refused to comply with Jackson's instructions to follow him out of the

wing. Officer Jackson returned to the control center and requested help. While Officer Jackson waited for assistance, Driscoll assembled a homemade knife from parts he had collected and hidden in his cell.[3]

Officer Jackson and two additional guards returned to the housing unit to remove Jenkins. The two other guards escorted Jenkins from the wing to the control center--one guard on each side of the prisoner--while Jackson trailed some distance behind. At that point, a group of twenty to thirty inmates from the wing, including Driscoll, charged the guards. The two guards escorting Jenkins made it to the rotunda where more guards were assembling to help control the situation; a crowd of prisoners, however, stopped Officer Jackson several feet short of the door. Jackson was restrained, beaten, and stabbed four times. At trial, the state advanced the theory that Driscoll stabbed Jackson three times, fatally penetrating his heart and lungs, and then stabbed another officer,

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[3]Later, after quieting the ensuing disturbance, investigators retrieved at least thirteen similar homemade knives from the wing. Authorities were still discovering knives possibly associated with the July 3, 1983 incident as late as the weeks immediately preceding Driscoll's trial. Officer Darnell testified that he discovered fifteen to twenty knives and other weapons during the shakedown of the cells after the disturbance. He further testified that three of the knives appeared to have blood on them. A total of fourteen knives (and other types of weapons) were submitted to the forensic laboratory for testing. Of those, only the knife connected to Driscoll tested positive for blood. Therefore, either Darnell made a mistake in his recollection or one or more of the bloody knives were lost.

Harold Maupin, in the shoulder as Maupin tried to rescue Jackson.

For a brief period, uncontrolled fighting between prisoners and guards raged both in the control center and just outside. After several thwarted attempts to rescue Jackson, guards successfully pulled him through the door into the rotunda. Jackson's shirt was covered in blood. The guards managed to control the worst of the fighting within a few minutes. Reinforcement guards herded inmates back to their cells by firing sixty to eighty shotgun blasts into the floor and ceiling of the housing wings. At some point, Driscoll returned to his cell and changed his clothes.

At the end of the fighting, Officer Jackson was dead and five other guards had been stabbed or otherwise injured. At least thirty inmates required treatment for their injuries; one prisoner was seriously wounded by a shotgun pellet. At trial, Driscoll presented substantial evidence that during the night of July 3rd and into the following day guards subjected the inmates of Unit 2B to brutal beatings in response to the incident. Driscoll's injuries, for example, required him to spend forty days in the prison hospital.

On July 4, 1983, just prior to his transfer to the Missouri State Penitentiary in Jefferson City, Missouri, Driscoll made an incriminating statement to investigating officers from MTCM and the Highway Patrol. In the statement, Driscoll admits that he "stabbed at" an officer after he was hit by someone. He stated that he did not know at which officer he stabbed or if he stabbed at the officer more than once. The trial court admitted the statement into evidence over Driscoll's objection that it was coerced and involuntary. Other evidence against Driscoll included the eyewitness testimony of two inmates and

incriminating statements Driscoll reportedly made to other inmates right after the fighting. Three guards testifying for the prosecution, however, identified another inmate, Rodney Carr, as the person they saw stab Officer Jackson. No guard saw Driscoll stab Jackson.

III. DISCUSSION

A. Ineffective Assistance of Counsel: Defense Handling of Serology Evidence

The Sixth Amendment guarantees a criminal defendant charged with a serious crime the right not merely to counsel, but to the effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 654 (1984). Any other interpretation of that right would permit a serious risk of injustice to infect criminal trials. Cuyler v. Sullivan, 446 U.S. 335, 343 (1980). "Absent competent counsel, ready and able to subject the prosecution's case to the 'crucible of meaningful adversarial testing,' there can be no guarantee that the adversarial system will function properly to produce just and reliable results." Lockhart v. Fretwell, 113 S. Ct. 838, 847 (1993) (Stevens, J., dissenting) (quoting United States v. Cronic, 466 U.S. 648, 654 (1984)).

The United States Supreme Court set out the standard for our review of claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). The analysis is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant

> must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

With respect to the performance aspect of the test, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Id. at 688. Our review of counsel's performance must be highly deferential; we indulge a strong presumption that counsels conduct falls within the wide range of professionally reasonable assistance and sound trial strategy. Id. at 689. For that reason,

> strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Id. at 690. Moreover, as instructed by the Supreme Court, we must "make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time [of trial]." Id. at 689.

Professionally unreasonable trial errors, however, do not satisfy the burden of proving ineffectiveness absent a showing of prejudice to the defendant. We will set aside

the judgment of conviction only when the defendant demonstrates that there is a reasonable probability that, but for counsels unprofessional conduct, the result of the proceeding would have been different. Id. at 694. In other words, a defendant who challenges his or her conviction is prejudiced by counsel's unprofessional conduct when "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. In determining prejudice, we consider all the evidence presented to the jury; we are mindful that some trial errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, whereas other errors will have produced only a trivial, isolated effect. Id. at 695-96.

The question of whether Driscoll's Sixth Amendment rights were violated because he received ineffective assistance of counsel is a legal one subject to our de novo review. Starr v. Lockhart, 23 F.3d 1280, 1284 (8th Cir. 1994). The state court's underlying factual findings related to counsel's performance and prejudice to the defendant are entitled to the presumption of correctness as set forth in 28 U.S.C. § 2254(d). Miller v. Fenton, 474 U.S. 104, 112 (1985).

The district court granted Driscoll habeas corpus relief and ordered that he receive a new trial because his counsel was ineffective in allowing the jury to retire with the factually
inaccurate impression that the victim's blood could have been present on Driscoll's knife. On appeal, the state argues that Driscoll failed to establish that defense counsel's handling of the serology evidence either constituted unreasonable performance or caused Driscoll prejudice. The state contends that the district court did not engage in the required two-part Strickland analysis; specifically, that

the court failed to consider whether the asserted errors by counsel prejudiced the defendant. While we acknowledge the shortcomings of the district court's consideration of prejudice, we reject the state's basic argument after engaging in the full, two-part Strickland review de novo.

Kwei Lee Su, Ph.D., Chief Forensic Serologist with the Missouri Highway Patrol Crime Laboratory, testified for the state at Driscoll's trial. Dr. Su conducted all the serological examinations on the state's evidence, which included a homemade knife belonging to Driscoll, thirteen additional homemade knives discovered during the investigation of the riot, the clothes worn by Officer Jackson at the time he was killed, and the clothes worn by various inmates, including Driscoll, on the night of the riot.

Before trial, the state provided Driscoll's lawyer with a three-page laboratory report that summarized the latent fingerprint, serological, and chemical examinations performed on the state's evidence. The first page of the report lists the specimens submitted to the laboratory for examination. The second page provides a brief, narrative summary of the results. The final page of the report contains a more comprehensive table that summarizes the results of the serology tests performed on the state's evidence. According to the laboratory report, the blood found on Driscoll's clothing--type 0--matched Officer Jackson's blood type. All of the homemade knives except for Driscoll's tested negative for blood traces. The blood traces found on Driscoll's knife were of type A--the same blood type of Officer Maupin, but not of the victim, Officer Jackson. The table also indicates that Jackson's dress boots tested positive for both "A" & "O" type blood.

At trial, the state advanced two alternative theories to explain the lack of the victim's blood on the alleged

murder weapon: either that the type 0 blood on Driscoll's knife got wiped off when Driscoll subsequently stabbed officer Maupin or that type 0 blood was present on the knife, but "masked" from detection because of the additional presence of type A blood.

With respect to the masking theory, Dr. Su testified that blood can be type A, type B, type AB, or type 0. Using a "thread" or "antigen" test, Dr. Su explained, a reagent called anti-A is added to the blood and agglutination (clumping) occurs if the blood is type A. Similar reagents signal the presence of type B and of type AB. Using this methodology, however, the presence of type 0 blood is signaled only by the absence of a reaction to anti-A and anti-B reagents. Thus, when type A blood and type 0 blood are mixed, the antigen test will not reveal the presence of the type 0 blood because the agglutination showing type A will occur. Dr. Su testified that with the antigen test type A blood "masks" the presence of type 0 blood.

Neither the prosecution nor the defense on cross-examination ever asked Dr. Su whether she used any other blood identification methods or whether she could have employed any other tests to establish with certainty the presence or absence of type 0 blood on Driscoll's knife. Driscoll's trial counsel asked Dr. Su only two questions on cross-examination: whether the only thing Dr. Su could say with any degree of medical certainty was that Driscoll's knife had blood type A on it and whether "anything else would just be speculation." Dr. Su answered affirmatively to both.

In fact, Dr. Su had performed another test on the knife, called the "lattes" antibody test. Like the thread test, the lattes test can determine the presence of each type of blood; unlike the thread test, however, no masking can

occur with the lattes test. Using the lattes test, Dr. Su discovered no type 0 blood on Driscoll's knife. The jury was never informed that the lattes test was performed or that no type 0 blood was on the knife. At Driscoll's Rule 27.26 state post-conviction hearing, Dr. Su was asked: "If you had been asked at trial regarding the antibody test, you could have testified that there was no 0 blood on the knife," to which she answered "yes." Hr'g Tr. at 32. She was also asked whether, if asked at trial, she could have testified that there had not been type 0 blood on the knife "at some time." Dr. Su responded: "It was not detected if it was there." Id.

In addition, at the Rule 27.26 hearing, Driscoll's trial lawyer testified that he did not interview Dr. Su prior to the time she gave her testimony. He admitted that he did not take any steps to adequately inform himself about the specific serology tests performed or the conclusions one could logically draw from the laboratory results. The record indicates that trial counsel simply reviewed the three-page summary of the serology evidence, noted that the tests did not demonstrate the existence of the victim's blood on Driscoll's knife, and "didn't see how it was going to hurt [him]." Hr'g Tr. at 91. He testified later that at the time of trial he was not aware of any scientific evidence that could have rebutted the state's serology evidence.

The combination of the prosecution's presentation of serology evidence and the defense's total lack of rebuttal left the jury with the impression that Driscoll's knife likely had been exposed to both type A blood and type 0 blood. In its closing argument, the state made much of the masking theory, turning unfavorable serology evidence into neutral evidence at worst:

The issue of the knife on the blood [sic] doesn't really prove anything. What it is is a neutral issue. . . . [W]hen you mix 0 and A together . . . it's going to react with the A part in the smudge and it's going to tell you that there is A there, but the 0 is undetectable.

And in this situation, what we have this magic combination. Tom Jackson had O-type blood. Harold Maupin had A-type blood. . . . [Y]ou're going to get the A-type reaction.

Now, I think, as you analyze the blood on the knife, you're going to understand that the blood on the knife is a neutral issue. Obviously the defense is going to make--you know--big work of that. But that's not significant at all. Chemically--the manner in which they test antigens in the A-type blood, it explains why you can't detect whether 0 is present when A and 0 are mixed.

. . . .

Also, the other reason why is the in and out. The stabbing [Jackson] in the chest, the pulling it out and the stabbing (Maupin] in the arm. Because it's a chemical fact of life. If you mix 0 and A together, you drop the dropper of stuff on it, and the presence of A mixed with 0 will cause a reaction under the microscope, which leads you to the logical conclusion that A is present. Now, that's just the way God made us.

Trial Tr. at 1929-30. In his closing argument, Driscoll's counsel merely reminded the jury that he had elicited the statement from Dr. Su on cross-examination that the only thing beyond speculation was that blood type A was on Driscoll's knife. He then deduced that the prosecutor "didn't get all the evidence out of her he wanted" because the state later brought another witness, Chief of Police James Simmerman, who essentially testified to the same possibility of wiping that Dr. Su did.

The questions now before us are (1) whether defense counsel's performance in failing to investigate and to adequately cross-examine Dr. Su about the serology tests performed on the state's evidence fell below an objectively reasonable standard of representation; and (2) if so, whether Driscoll was prejudiced by these failures. We answer both questions in the affirmative.

Although our scrutiny of defense counsel's performance is deferential and we presume his conduct to fall within the wide range of competence demanded of attorneys under like circumstances, Strickland, 466 U.S. at 687-89, "when the appellant shows that defense counsel 'failed to exercise the customary skills and diligence that a reasonably competent attorney would exhibit under similar circumstances,' that presumption must fail." Starr v. Lockhart, 23 F.3d 1280, 1884 (8th Cir. 1994) (quoting Hays v. Lockhardt, 766 F.2d 1247, 1251 (8th Cir.), cert. denied, 474 U.S. 922 (1985)), cert. denied, 115 S. Ct. 494 (1994). Driscoll faced a charge of capital murder and the possibility of the death sentence if convicted. Whether or not the alleged murder weapon--which was unquestionably linked to the defendant--had blood matching the victim's constituted an issue of the utmost importance. Under these circumstances, a reasonable defense lawyer would take some measures to understand the laboratory tests performed

and the inferences that one could logically draw from the results. At the very least, any reasonable attorney under the circumstances would study the state's laboratory report with sufficient care so that if the prosecution advanced a theory at trial that was at odds with the serology evidence, the defense would be in a position to expose it on cross-examination.

Here, the state explained the lack of the victim's blood on the defendant's knife by telling the jury, in essence, that although both type A and type 0 blood were on the knife, the
serology test could only detect type A. In fact, another test had been performed that conclusively disproved that theory. A reasonable defense lawyer would have been alerted to the possibility of conclusively detecting both A and 0 on the same item of evidence by the laboratory report itself. Whereas the report indicates that only type A was found on Driscoll's knife and that only type 0 was found on Jackson's clothes and on Driscoll's pants, the report indicates that both type A and type 0 blood were detected on Jackson's dress boots.[4] Considering the circumstances as a whole, defense counsel's failures to prepare for the introduction of the serology evidence, to subject the state's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression that the victim's blood might have been present on the defendant's knife fall short of reasonableness under the prevailing professional norms.

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[4]We also note that with respect to some of the items of evidence the blood detection and typing table indicates "IC," meaning inconclusive, under the column indicating the blood type. Thus, the logical inference is that where a specific blood type (or types) was determined, it had been determined conclusively.

Applying the second prong of the Strickland analysis, we conclude that the inadequate performance of his lawyer prejudiced Driscoll. There is a reasonable probability that, absent these errors, the jury would have found reasonable doubt with respect to Driscoll's guilt. In addition to the serology evidence in question, the state's case against Driscoll rested primarily on the presence of the victim's blood on Driscoll's pants, the suspect eyewitness testimony of prisoners involved in the riot, and the incriminating statement Driscoll gave to investigators in which he admitted "stabbing at an officer." Given that the trial evidence established that Driscoll stabbed Officer Maupin--who has blood type A--and that the guards who actually saw an inmate stab Officer Jackson identified Carr as the assailant, we cannot say that had the jury been made aware that the victim's blood was conclusively absent from Driscoll's knife it still would have found him guilty of Jackson's murder. Thus, we agree with the district court that defense counsel was ineffective.

B . Ineffective Assistance of Counsel: Failure to Impeach State's Eyewitness with Prior Inconsistent Statements

The district court also found that Driscoll's trial counsel provided ineffective assistance by failing to impeach the testimony of one of the state's witnesses using evidence of prior inconsistent statements. We agree with the district court's decision.

At Driscoll's trial, the state offered the eyewitness testimony of two inmates, Joseph Vogelpohl and Edward Ruegg. First, Vogelpohl took the stand and told the jury that he saw Driscoll stab Officer Jackson in the upper left part of his chest. Trial Tr. at 909. Vogelpohl also testified that after witnessing Driscoll stab Jackson, he returned to Driscoll's cell to continue watching television as he had

been before the disturbance began. According to Vogelpohl, Driscoll returned to his cell a while later and, before changing his clothes, said to Vogelpohl: "Did I take him out, JoJo, or did I take him out." Trial Tr. at 922. On cross-examination, Driscoll's lawyer questioned Vogelpohl about his prior convictions, Trial Tr. at 926-27, about his intoxication level on the night in question, Trial Tr. at 945-46, about the beatings he and other inmates received from corrections officers after the riot, Trial Tr. at 935-38, and about whether he had discussed the case with other inmates, Trial Tr. at 931-33. Driscoll's lawyer also raised some question as to whether Vogelpohl also possessed a knife. Trial Tr. at 948-52.

In his petition, Driscoll asserts that his counsel was ineffective, however, because he failed to impeach Vogelpohl's testimony with evidence that Vogelpohl had made prior inconsistent statements to investigators. Shortly after the incident at MTCM, Vogelpohl had given a statement to two investigating officers. According to one of the officer's notes, Vogelpohl told them that when Driscoll returned to his cell he told Vogelpohl that one of the officers "had been stuck." Hr'g Tr. at 21. Shortly thereafter, Vogelpohl had given a second statement to a different investigator. According to that investigator's interpretation of Vogelpohl's statement, Driscoll told Vogelpohl "that [Driscoll] or someone took out a guard." Hr'g Tr. at 47. In his statements prior to trial, Vogelpohl did not say that Driscoll admitted to stabbing Officer Jackson, much less that Vogelpohl witnessed Driscoll stab Jackson.

Driscoll's lawyer, who knew about Vogelpohl's statements to investigators, never questioned him about the inconsistencies between those prior statements and his

testimony at trial.[5] In fact, counsel never made the jury aware of Vogelpohl's prior statements. Driscoll's trial counsel subsequently testified that this omission was not a matter of trial strategy.[6] Moreover, we conclude that there

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[5]On appeal, the state argues that we are bound, under 28 U.S.C. § 2254(d), by the Missouri Supreme Court's factual determination that Vogelpohl's prior statements were consistent with his trial testimony. See Driscoll v. State, 767 S.W.2d 5, 14 (Mo.), cert. denied, 493 U.S. 874 (1989). We note that the Missouri Supreme Court merely concluded that the trial court did not commit plain error by determining that the statements were not directly inconsistent with Vogelpohl's trial testimony. Assuming that the consistency of Vogelpohl's statements constitutes a factual finding, it is unprotected by the presumption of correctness because it is not fairly supported by the record. 28 U.S.C. § 2254(d)(8).

[6]At Driscoll's Rule 27.26 hearing in state court, his trial counsel explained: "[Vogelpohl] was about as hostile as a witness could be. He was the State's witness and he was completely uncooperative and fairly well, what I would assume, was coached as to what he was going to say." Hr'g Tr. at 61. With respect to Vogelpohl's prior inconsistent statements, trial counsel gave the following answers to questions:

> Q: Okay. Now, you were asked about these statements of Mr. Vogelpohl to both [Investigator] Schreiber and [Investigator] Wilkinson. If Mr. Schreiber testified that Vogelpohl -- Vogelpohl said to Schreiber that Mr. Driscoll had said to him, quote, "One of the officers, which was Officer Jackson, had been stuck," end quote.

is no objectively reasonable basis on which competent defense counsel could justify a decision not to impeach a state's eyewitness whose testimony, as the district court points out, took on such remarkable detail and clarity over time.

The question, therefore, becomes whether Driscoll was prejudiced by his counsel's deficient performance. The

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> And then Vogelpohl testified at trial that Mr. Driscoll had said to him, "Did I take him out, JoJo, or did I take him out." Do you agree that those two statements can be construed as being inconsistent?
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> . . . .
>
> A: Okay. Yes, that's inconsistent.
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> . . . .
>
> Q: Okay. Would it have been consistent with your trial strategy to bring up that statement of —
>
> A: Yes, it would have.
>
> Q: Was there any matter of trial strategy involved in not bringing up that prior inconsistent statement to Mr. Schreiber?
>
> A: No, there was not.

Hr'g Tr. at 77-78.

state offered the testimony of another witness, Edward Ruegg, who, like Driscoll, admitted to taking part in the fighting that night. Ruegg testified that he saw Driscoll stab Officer Jackson three or four times and that he saw the knife penetrate Jackson's chest once. Trial Tr. at 1042-43. On cross-examination, Ruegg testified that he was badly beaten during and after the riot and that he was afraid for his life when he gave a statement to investigators. Ruegg admitted:

> . . . I told [the investigators] anything they wanted to hear--I just wanted to tell them something. So they--I mean, virtually I told them anything they wanted to hear just so they would leave me alone and because I knew I had to go back to population with regular inmates.

Trial Tr. at 1058-59. Driscoll later presented the testimony of another inmate who said that Ruegg admitted to him that he did not see who stabbed Jackson. Trial Tr. at 1593 (Lassen testimony).

As the Supreme Court recognized in Strickland, "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture . . . ." Strickland, 444 U.S. at 695-96. Vogelpohl testified before Ruegg did. The apparent strength of Vogelpohl's claim to have seen the same events that Ruegg later testified to seeing must have offset, in the minds of the jurors, Ruegg's admission that he was scared enough to say anything that he thought the investigators wanted to hear.[7] We agree with the district court that

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[7]Besides Vogelpohl and Ruegg, the only inmate to actively implicate Driscoll in Jackson's murder was Jimmie

counsel's failure to impeach Vogelpohl was a breach with so much potential to infect other evidence that, without it, there is a reasonable probability that the jury would find reasonable doubt of Driscoll's guilt. Therefore, his trial counsel.'s omission amounted to a deprivation of Driscoll's Sixth Amendment right to counsel.

C. Prosecutor's Misleading Statements to the Jury Regarding Its Sentencing Responsibility

1. Eighth Amendment

The district court accepted Driscoll's claim that the trial court denied Driscoll his Fifth Amendment right to due process of law because it failed, sua sponte, to curtail the repeated efforts by the prosecution to minimize the jury's sense of responsibility for sentencing Driscoll to death. We need not decide whether the district court correctly determined that the trial court's failure to admonish the prosecutor violated Driscoll's due process rights. Rupp v. Omaha Indian Tribe, 45 F.3d 1241, 1244 (8th Cir. 1995) ("We may affirm the judgment of the district court on any ground supported by the record, even if the district court

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Jenkins, Driscoll's cellmate and the person whose removal from the wing provoked the disturbance. Although he did not claim to have witnessed the stabbing, Jenkins testified that Driscoll ran up to him immediately after the fighting and said, 'I killed the freak." On cross-examination, defense counsel impeached Jenkins--in the very way he failed to impeach Vogelpohl--by eliciting from him the fact that in two prior statements Jenkins gave investigators immediately following the riot, he never mentioned Driscoll's supposed statement to him.

did not rely on it.") (citing Monterey Dev. v. Lawyer's Title Ins., 4 F.3d 605, 608 (8th Cir. 1993). Instead, we conclude that Driscoll was sentenced to death in violation the Eighth Amendment because the sentencing jury was misled by the prosecutor to believe that the ultimate responsibility for its decision rested elsewhere.

Throughout the trial, the prosecution made statements to the jury that were calculated to diminish the degree of responsibility the jury would feel in recommending a sentence of death. The prosecutor repeatedly referred to the judge as the "thirteenth juror" and explained that the jury's sentence of death would be a mere recommendation to the judge; in his most egregious statements, the prosecutor announced that "juries do not sentence people to death in Missouri," and, at one point, even told jurors it did not matter whether they returned a recommendation for the death penalty because the judge can simply overrule their decision.[8] Driscoll's

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[8]The following references, although certainly not exhaustive, provide a representative sample of the prosecutor's remarks:

> Now, is there any question about the fact that a jury who returns a verdict of a recommendation of death, that it's only a recommendation to the Court, who later sentences the defendant? Does everybody understand that? Okay. Because juries don't sentence people to death in Missouri. Trial Tr. at 540 (voir dire) (emphasis added).
>
> . . . .
>
> Now, lest you get another

misconception--you're not the only ones voting as jurors. The Judge has a vote. It's really thirteen votes. But the Judge's vote is a veto vote. It doesn't matter whether you return a recommendation for the death penalty. The judge can overrule you and still give the defendant fifty years in prison without parole--after looking more in the defendant's background, et cetera--and those kinds of things. Trial Tr. at 555 (voir dire) (emphasis added).

. . . .

Well, I'll tell you. What's going to happen to Bobby Driscoll is it's going to depend on what the judge does. And it's--in a way, it's certainly going to depend on what you do. Trial Tr. at 2103 (closing argument).

. . . .

But when you've returned a verdict of--say a recommendation of death, you each have an individual vote. But also, the judge has a vote. Do you understand that? In other words, it takes thirteen. Trial Tr. at 481 (voir dire).

. . . .

The recommendation which you will make will be no more than a recommendation so that the Judge can consider when he is determining in his mind whether or not to

counsel never objected to any of these statements at trial.

Our analysis is controlled by Caldwell v. Mississippi, 472 U.S. 320, 239 (1985), in which the Supreme Court held it constitutionally impermissible to rest a death sentence on a determination made by a jury that has been led to believe that the responsibility for determining the appropriateness of the death sentence rests elsewhere. The Court decided Caldwell on June 11, 1985, before Driscoll's conviction became final.[9] Driscoll is thus entitled to the benefit of the Supreme Court's decision. Cf. Sawyer v. Smith, 497 U.S. 227 (1990) (holding that Caldwell announced a new rule as defined by Teague v. Lane, 489 U.S. 288 (1989)). Driscoll raised his substantive claim

sentence Driscoll to death--he'll have that option. Trial Tr. at 2004 (closing argument).

. . . .

And you understand when I say "imposing" [the death penalty], what you're doing is recommending to Judge Long to consider it? Trial Tr. at 580 (voir dire).

[9]Driscoll's trial commenced in state court on November 26, 1984; the court sentenced him to death on February 7, 1985. The Supreme Court granted certiorari in Caldwell on October 9, 1984, just before Driscoll's trial began. 469 U.S. 879 (1984). The Court decided Caldwell, however, on June 11, 1985, more than four months before Driscoll's case became final on October 20, 1986 when the Supreme Court denied Driscoll's petition for certiorari, Driscoll v. Missouri, 479 U.S. 922 (1986).

under Caldwell in the Missouri Supreme Court on both direct and collateral appeal, and the state court fully considered these claims on their merits. State v.. Driscoll, 711 S.W.2d 512, 515-16 (Mo.), cert. denied, 479 U.S. 922 (1986) (direct appeal); Driscoll v. State, 767 S.W.2d 5, 9-10 (Mo.), cert. denied, 493 U.S. 874 (1989) (collateral appeal). Under 28 U.S.C. § 2254, however, we are not bound by the Missouri court's interpretation of the United States Constitution.

In Caldwell, the prosecutor minimized the importance
of the jury's sentencing decision by telling the jury that the sentence it imposed would be reviewed for correctness on appeal. The Court concluded that the prosecutor's statements were impermissible because they gave the jury the false sense that the responsibility for sentencing the defendant to death rested not with the jury, but with the state court of appeals. The Court explained:

> The "delegation" of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him of that right, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance.

Caldwell, 472 U.S. at 330. Our circuit recognized that Caldwell "condemns state-induced comments that 'mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" Gilmore v. Armontrout, 861

F.2d 1061, 1066 (8th Cir. 1988) (quoting Darden v. Wainwright, 477 U.S. 168, 184 n.15 (1986)).

In this case, the prosecutor's statements impermissibly misled the jury to minimize its role in the sentencing process under Missouri law. Missouri's capital murder statute, under which Driscoll was convicted and sentenced to death, permitted imposition of a death sentence only if the jury unanimously voted for death, Mo. Rev. Stat. § 565.006 (Supp. 1982) (repealed effective October 1, 1984), after considering all relevant mitigating and aggravating factors, Mo. Rev. Stat. § 565.012.4 (1979) (repealed effective October 1, 1984). Further, Missouri Supreme Court Rule 29.05 provides: "The court shall have power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive."

Despite their technical accuracy under Missouri law, the prosecutor's statements were impermissible because they misled the jury as to its role in the sentencing process in a way that allowed the jury to feel less responsibility than it should for its sentencing decision. For example, the prosecutor told the jury that (1) juries do not sentence defendants to death, and (2) it did not matter whether the jury sentenced Driscoll to death because the judge could simply overrule their decision. Far from a decision that does not matter, a jury's determination to recommend a sentence of death is a matter of almost unparalleled importance. The judge could not have sentenced Driscoll to death absent the jury's recommendation to do so. Mo. Rev. Stat. § 565-006(2) (Supp. 1982) (repealed effective

October 1, 1984). Moreover, for all practical purposes, a jury's recommendation of death is final.[10]

When we consider the prosecutor's statements as a whole, we conclude that they implicate the exact concerns that are at the heart of Caldwell: They fundamentally misrepresented the significance of the jury's role and responsibility as a capital sentencer and misled the jury as to the nature of the judge's review of its sentencing determination. See Caldwell, 472 U.S. at 336; see also id. at 342-43 (O'Connor, J., concurring) ("[T]here can be no 'valid state penological interest' in imparting inaccurate or misleading information that minimizes the importance of the jury's deliberations in a capital sentencing case."). The prosecutor essentially told the jury that it could defer the extremely difficult decision of whether or not Driscoll should be sentenced to death. As a consequence, the jury made the decision that Driscoll would be killed without full recognition of the importance and finality of doing so and, therefore, without affording the decision the full consideration it required. Driscoll's death sentence does not meet the standard of reliability that the Eighth Amendment requires. Thus, Driscoll's capital sentence is vacated and he is entitled to a new sentencing hearing.

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[10]Although Missouri Supreme Court Rule 29.05 technically vests the trial court with the power to reduce a jury-imposed sentence which it deems "excessive," since Missouri reenacted the death penalty in the late 1970's, "[n]o judge has ever spared a murderer the death penalty when a jury has recommended it." William C. Lhotka, Judges Back Juries on Death Penalty, St. Louis Post-Dispatch, December 6, 1992, at 9C. As one trial judge explains: "I can't imagine myself going against the cumulative wisdom of the jury. That's why we rely on the jury system." Id.

2. Ineffective Assistance of Counsel

The district court also granted Driscoll habeas relief because it concluded that his counsel was ineffective for failing to object to the repeated efforts by the prosecution to diminish the degree of responsibility the jury would feel in recommending a sentence of death as discussed above. The district court, however, applied the wrong analysis to the claim of ineffectiveness, and instead treated it as if it were a substantive claim under Caldwell v. Mississippi, 472 U.S. 320 (1985). Although handed down before Driscoll's conviction became final, Caldwell was not the law at the time of Driscoll's trial; moreover, the Court's decision in Caldwell was not dictated by the precedent existing at the time of Driscoll's

trial. Sawyer v. Smith, 497 U.S. 227, 235 (1990) . Therefore, his lawyer's effectiveness cannot be assessed in light of Caldwell's mandate. We cannot require trial counsel to be clairvoyant of future Supreme Court decisions in order to provide effective assistance. Horne v. Trickey, 895 F.2d 497, 500 (8th Cir. 1990). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." Strickland, 466 U.S. at 689. Thus, we evaluate trial performance in light of the law and circumstances as they existed at the time of trial. Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir. 1987).

Although misleading, the majority of the statements to which defense counsel failed to object constituted technically correct statements under Missouri's capital statute and Rule 29.05. At the Rule 27.26 hearing in state court, Driscoll's trial counsel testified that, although he considered the prosecutor's comments "offensive," he

believed them to accurately reflect the law and he felt he had no basis on which to object.[11] We have no reason to believe that the trial court would have sustained counsel's objections had he advanced them at trial. Moreover, Driscoll's trial lawyer admitted to a general trial strategy that included minimizing the number of objections he made during the other side's closing argument.[12] We must conclude that counsel's strategic decision not to object under the circumstances was objectively reasonable. Because we conclude that Driscoll makes and insufficient showing that his trial lawyer's failure to object under the circumstances constituted inadequate performance, we need not discuss prejudice. Strickland, 466 U.S. at 699.

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[11]For example, when asked whether, at the time of trial, he believed that the prosecutor's statement that the judge imposes sentence on the defendant was a correct one he replied: "What I believe was a correct statement of the law was that the Judge had the ability to override the jury sentence if--which, in fact, was the law." Hr'g Tr. at 65. He elaborated: "Use of the term 'thirteenth juror' was offensive to me; but I thought his statement of the law was correct. And I did not know that the statement was objectionable." Hr'g Tr. at 82.

[12]At the Rule 27.26 hearing trial counsel stated: "[I]t's my personal policy, in closing arguments, not to interrupt or make objections unless it's what I consider to be seriously damming [sic] to my case or something that's a flagrant misstatement of the facts as they were revealed at trial." Hr'g Tr. at 84.

D. Ineffective Assistance of Counsel: Failure to Request a Jury Instruction on the Lesser- Included Offense of Second Degree Felony Murder

The district court also determined that Driscoll's trial counsel was constitutionally ineffective because he failed to request a jury instruction on the lesser-included,, non-capital offense of second degree felony murder. At Driscoll's trial, the jury retired with instructions on capital murder, as well as on the non-capital offenses of conventional second degree murder (intentional murder without deliberation) and manslaughter. In his petition, Driscoll asserts that his counsel's failure to request the additional instruction constituted ineffectiveness in light of Beck v. Alabama, 447 U.S. 625 (1980) (holding that the death penalty may not be imposed when the jury is prohibited from considering a verdict of guilt of a lesser-included, non-capital offense) . The state argues that Beck and its progeny require only that the jury be allowed to consider a "third option" besides finding the defendant guilty or not guilty of capital murder. We agree with the state's interpretation of the law under Beck.

In Beck v. Alabama, 447 U.S. 625 (1980), the Supreme Court held unconstitutional an Alabama statute that prohibited lesser-included offense instructions in capital cases. As the Court later explained:

> Our fundamental concern in [Beck] was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all

> . . . . We repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented.

Schad v. Arizona, 501 U.S. 624, 645 (1991) (internal quotation and citations omitted). As long as it considers a "third option," the reliability of the jury's capital murder conviction will not be diminished the way it is when the jury is forced into an all-or-nothing choice. Id.

This case, like Schad, does not implicate the central concern of Beck because the jury did not face an all-or-nothing choice. In addition to capital murder, the jury considered the lesser-included, non-capital offenses of second degree murder and manslaughter. The record indicates that Driscoll sought an acquittal, not a conviction of a lesser offense.[13] This fact explains his lawyer's strategic choice not to request an instruction on the additional lesser-included offense of second degree felony murder which would have necessarily emphasized Driscoll's admitted role in the riot. We conclude that his counsel acted reasonably; as a consequence, Driscoll was not denied effective counsel by the omission. Because Driscoll

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[13]As Driscoll's counsel later testified, his strategy at trial was "to put evidence on to the effect that other individuals stabbed Tom Jackson." Hr'g Tr. at 63. During his closing argument, Driscoll's lawyer argued that the state had failed meet its burden of proof and that Driscoll was being used as a scapegoat for the murder of a corrections officer. At one point he explained to the jury: "Ordinarily, at this stage of the closing argument, the defense attorney is supposed to talk about reasonable doubt. I'm not going to go into that because there's mounds and mounds and mounds of doubt." Trial Tr. at 1963.

received effective assistance with respect the challenged instructions, we reverse the district court.

E. Remaining Claims

The district court found two additional bases to support Driscoll's claim that he was denied due process: (1) the trial court failed to instruct the jury, sua sponte, on the lesser included offense of second degree felony murder; and (2) the trial court allowed the state to offer improper rebuttal testimony. We reverse the district court on both grounds. The first of these claims is disposed of by our discussion of Driscoll's trial counsel's performance with respect to the jury instructions, supra, Section III (D). The court had no due process obligation to submit a particular lesser-included offense instruction to the jury. With respect to the second contention, Missouri law provides that the scope of rebuttal testimony is left to the sound discretion of the trial court. State v. Leisure, 749 S.W.2d 366, 380 (Mo. 1988). Further, Driscoll raised this claim on direct appeal and the Missouri Supreme Court dismissed it as meritless. Driscoll, 711 S.W.2d at 518. In no event does the trial court's determination of this evidentiary issue rise to the level of a constitutional violation.

Finally, by affirming the district court's order in all other respects, supra n.2, we reject the claims by Driscoll in his cross-appeal.

IV. CONCLUSION

We affirm the district court's order, in part, concluding that a writ of habeas corpus should issue on three independent bases: (1) Driscoll was denied the effective counsel guaranteed by the Sixth Amendment because his lawyer allowed the jury to retire with the

factually inaccurate impression that the victim's blood was possibly on Driscoll's knife; (2) his trial counsel was also ineffective for failing to impeach a state eyewitness using his prior inconsistent statements; and (3) the prosecutor's repeated statements to the jury impermissibly diminished the jury's sense of responsibility for its sentence of death and rendered Driscoll's death sentence infirm under the Eighth Amendment. The district court shall vacate Driscoll's conviction and sentence and order him released unless the state commences proceedings to retry him within 120 days.

We reverse the district court's order, in part, because we conclude that the following challenges to Driscoll's conviction do not warrant habeas corpus relief: (1) Driscoll's trial counsel was ineffective for failing to object to the prosecutor's misleading statements to the jury; (2) Driscoll received ineffective assistance of counsel as a result of his lawyer's failure to request a jury instruction on the lesser-included offense of second degree felony murder; (3) the trial court denied Driscoll due process of law by failing to, sua sponte, instruct the jury on second degree felony murder; and (4) the trial court denied Driscoll due process of law by allowing the state to introduce rebuttal testimony.

HANSEN, Circuit Judge, concurring.

I concur in Parts I, II, III (A), III (C) (2), III (D), and III (E) of the court's opinion and in its judgment. I agree that Driscoll's defense counsel's performance at trial with respect to the serology evidence meets the first part of the Strickland test. It was of fundamental importance that the defense show conclusively (and with reasonable investigation and pretrial, preparation it could have done so) that none of Officer Jackson's blood was on the knife the

state claimed was used by Driscoll to murder the officer. I am also of the view that there is a reasonable probability that but for counsel's deficient performance, the result in the guilt phase of Driscoll's case would have been different. Moreover, and after considering the totality of the evidence, because of the crucial nature of this exculpatory evidence, my confidence in the outcome of the case is seriously undermined to the extent that I believe the result reached is unreliable. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

Because I agree that Driscoll is entitled to a new trial, respectful disagreements with the court's analysis and opinion with regard to Driscoll's Caldwell claim and with his claim concerning the cross-examination of the witness Joseph Vogelpohl (contained in Parts III(B) and III(C)(1) of the opinion) do not require explication except to say that I do not believe Driscoll has ever asserted the stand-alone Eighth Amendment Caldwell claim upon which the court today grants him relief. The Caldwell claim has always been made as a part of Driscoll's ineffective assistance of counsel claim, and as a claim that the state trial court denied him due process by not admonishing the prosecutor sua sponte concerning the complained-of comments. As indicated, I agree with the court's conclusion that Driscoll's trial counsel could not be constitutionally ineffective for not making a Caldwell objection
before Caldwell was decided.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT DRISCOLL,	)	
	)	
Petitioner,	)	
	)	No. 89-1894C(6)
vs.	)	
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

ORDER

In accordance with the memorandum filed herewith this day,

IT IS HEREBY ORDERED that respondent's objections to the Report and Recommendation of the United States Magistrate Judge are overruled.

IT IS FURTHER ORDERED that petitioner's objections to the Report and Recommendation of the United States Magistrate Judge are overruled.

IT IS FURTHER ORDERED that the Report and Recommendation of the United States Judge is sustained, adopted and incorporated herein.

IT IS FURTHER ORDERED that the petition of Robert Driscoll, a/k/a Albert Eugene Johnson, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is granted.

Dated this 8th day of July, 1994.

George F. Gunn, Jr.

GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT DRISCOLL,	)	
	)	
Petitioner,	)	
	)	No. 89-1894C(6)
vs.	)	
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

MEMORANDUM

This matter is before the Court on the petition of Robert Driscoll, a/k/a Albert Eugene Johnson for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Pursuant to 28 U.S.C. § 636(b), the Court referred all pretrial matters in this action to United States Magistrate Judge Catherine D. Perry. On January 18, 1994, Magistrate Judge Perry filed her Report and Recommendation recommending that the petition be granted. Respondent filed forty-three pages of objections to the Report and Recommendation on March 10.[1] Counsel for petitioner

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[1]The Court notes that on pages two and three, respondent begins his list of objections with the assertion that the Magistrate Judge erred in her reliance on Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993) because "that opinion has been vacated by the appellate court." Respondent asserts that the opinion was vacated on February 22, 1994. Respondent is incorrect in his assertion. The opinion in Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993) has not been

filed four pages of objections to the Report and Recommendation which consisted of twenty-one conclusory assertions of error and lacked any legal authority. Despite several requests for an extension of time in which to file a response to respondent's objections, counsel for petitioner has failed to file the response. Petitioner filed pro se objections to respondent's objections to the Report and Recommendation on June 9, 1994.

After de novo review of the record, including all objections to the Report and Recommendation, the Court finds the well-reasoned opinion of the Magistrate Judge to be proper in all respects. Accordingly, the Court will grant the petition of Robert Driscoll, a/k/a Albert Eugene Johnson, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Dated this 8th day of July, 1994.

George F. Gunn, Jr.

GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

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vacated.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT DRISCOLL, a/k/a ALBERT EUGENE JOHNSON, Petitioner,	)	
vs.	)	No. 89-1894-C(6) (CDP)
PAUL DELO, Respondent.	)	

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the petition of Robert Driscoll, a/k/a Albert Eugene Johnson, for a writ of habeas corpus under 28 U.S.C. S 2254. All pretrial matters in this case were referred to the undersigned pursuant to 28 U.S.C. § 636(b).

On December 5, 1984, Robert Driscoll was found guilty by a jury in Phelps County, Missouri, of capital murder in violation of § 565.001 R.S.Mo. (1978) (repealed effective October 1, 1984). On December 6, 1984, the jury recommended that Driscoll be sentenced to death. Thereafter, on February 7, 1985, petitioner was sentenced to death by lethal gas. (Resp. Exh. B-4 at 952-55). Petitioner appealed, counsel was appointed to assist him, and an appellate brief was filed, to which petitioner added a pro se addendum. The Missouri Supreme Court affirmed the conviction and sentence. State v. Driscoll, 711 S.W.2d

512 (Mo. banc), cert. denied, 479 U.S. 922 (1986). Petitioner then filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 27-26 (repealed effective January 1, 1988). Counsel was again appointed to assist petitioner, an amended motion was filed, and an evidentiary hearing was held on April 24, 1987 to weigh the merits of petitioner's motion. Petitioner also made a pro se addendum to his Rule 27.26 motion on that date. On June 22, 1987, petitioner's motion was denied. Petitioner appealed and the Missouri Supreme Court affirmed. Driscoll v. State, 767 S.W.2d 5 (Mo. banc), cert. denied, 493 U.S. 874 (1989).

On October 6, 1989, petitioner filed the instant petition for federal habeas relief. Counsel was appointed to assist petitioner and, on October 22, 1990, an amended petition was filed seeking relief on any of the following claims:

(1) Petitioner was denied the effective assistance of trial counsel because counsel failed to:

(a) challenge venire person Harris for cause, or remove her with a peremptory strike, after venire person Harris made comments reflecting the fact that she might have difficulty remaining unbiased should it become apparent that petitioner committed the crime while under the influence of alcohol;

(b) make a reasonable effort to rehabilitate four venire persons whom the prosecution successfully removed for cause;

(c) adequately prepare for the introduction of blood identification evidence at trial and counsel failed to properly cross- examine Dr. Kwei Lee Su regarding blood identification testing methodology;

(d) object to repeated instances of prosecutorial misconduct inimical to peti tioner's defense as follows:[1]

(i) The prosecuting attorney implied that the State of Missouri brought only guilty men to trial. That argument suggested to the jury that the burden of proof somehow was upon Mr. Driscoll and this undermined the presumption of innocence.

(ii) The prosecuting attorney informed the jury during his closing argument that he had spoken to the victim's widow the night before "and she thanks you."

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[1]Petitioner, at ¶¶ 28-30 and 53 of his amended petition, implies that the list of offensive acts exceeds those acts enumerated in 1(d) above, but the undersigned is unable to speculate as to what those additional acts might have been.

(iii) The prosecutor repeatedly placed incompetent evidence before the jury;

(iv) The prosecutor made "assurances of special knowledge before the jury;" and

(v) The prosecutor attempted to minimize the jury's sense of responsibility in making a recommendation regarding petitioner's punishment.

(e) request a jury instruction on the lesser included offense of second degree felony murder;

(f) introduce mitigating evidence at the punishment phase of petitioner's trial that petitioner had saved the life of another prisoner;

(g) investigate, and introduce into evidence, petitioner's psychological problems stemming from childhood incest and a series of head injuries;

(h) object to the Court's instruction regarding mitigating factors at the

punishment phase of petitioner's trial;

(i) seek a ruling by way of a motion in limine regarding the admissibility of evidence involving petitioner's participation in the Aryan Brotherhood;[2]

(j) avoid introducing damaging evidence regarding petitioner's involvement in the Aryan Brotherhood;

(k) cross-examine Joseph Vogelpohl regarding prior inconsistent statements Vogelpohl made to investigating officers;

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[2]This organization has variously been referred to as the Aryan Brotherhood, the Aryan Brotherhood of Jesus Christ Christian, the Aryan Nation, the Aryan Nation Church and the Aryan Nation Church of Jesus Christ Christian in the various documents which comprise the record in this case. Plaintiff, ultimately, admitted that he was a member of the Aryan Brotherhood (Trial Transcript at 2083), but evidence was presented on both sides of the question as to whether the Aryan Brotherhood and the Aryan Nation Church of Jesus
Christ Christian were in fact synonymous. (Compare Trial Transcript at 1620 with Transcript at 1845).

(l) raise 26 issues in a motion for a new trial and counsel failed to otherwise preserve these 26 issues for appeal;[3]

(m) ask members of the jury venire whether they would consider a life sentence should they convict petitioner of capital murder rather than the death sentence;

(n) object to the prosecutor's closing argument that any sentence other than the death sentence would result in petitioner's committing other crimes in the future;

(2) petitioner was denied due process because his trial court:

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[3]Petitioner alleges, at ¶ 66 of his amended petition, that "counsel failed to object to numerous instances of trial error or to preserve such objections within a motion for a new trial." In light of petitioner's intent to raise all grounds herein which he properly exhausted in state court (see original pro se petition at p. 5), the undersigned interprets ¶ 66 of petitioner's amended petition to be a reassertion of claims 8(a)(4) and 8(c) presented in petitioner's Rule 27.26 motion, as supplemented by the addendum, which was re-raised as ground IX on the appeal of the denial of that motion. This ground, then, is presented as claim l(l) above.

(a) refused to excuse venire person Harris for cause, sua, sponte;

(b) improperly excused venire persons Hodge, Baker, Lewis, and Carr for cause because they replied during voir dire that they would have difficulty recommending a death sentence;

(c) abandoned the agreed-upon practice of examining six venire persons at a time in favor of examining thirteen at a time and thus prejudiced petitioner because the practice of examining large groups at voir dire "produces juries which are more conviction and death sentence prone";

(d) erred by admitting into evidence a key and a knife discovered inside petitioner's body on the first day of his trial, as well as the x-rays of that key and knife;

(e) failed to, sua sponte, curtail the repeatedinstances of prosecutorial misconduct discussed at claim (1)(d) supra;

(f) failed to instruct the jury, sua sponte, on the lesser included offense of second degree felony murder;

(g) erroneously instructed the jury that no juror could consider a mitigating

circumstance unless all the jurors were unanimous on the finding of any mitigating circumstance;

(h) erroneously compelled petitioner and petitioner's witnesses to appear before the jury shackled;

(i) permitted the rebuttal testimony of James Timmerman;

(j) failed to, sua sponte, prohibit the prosecutor from arguing in closing that any sentence other than the death sentence would result in petitioner's committing other crimes in the future;

(3) petitioner's first, eighth, and fourteenth amendment rights were violated, and petitioner was unduly prejudiced when the trial court permitted the prosecution to inquire of petitioner and his witnesses regarding their association with the Aryan Brotherhood;

(4) petitioner's right not to be forced to testify against himself was violated when the court admitted involuntary extra judicial statementspetitioner had made;

(5) petitioner's fourth amendment right to be free from an unreasonable search and seizure was violated when he was x-rayed on the first day of trial (petitioner then reasserts the claim presented at (2)(d) supra);

(6) petitioner's trial court sentenced petitioner to death in violation of the eighth amendment because:

(a) petitioner's sentence is excessive and disproportionate when compared to similar cases;

(b) the evidence of aggravating circumstances was insufficient to support the death penalty when viewed in tandem with the evidence petitioner provided of mitigating factors;

(7) the trial court violated petitioner's first, fifth, sixth, ninth, and fourteenth amendment rights by refusing petitioner's request to allow a clergyman to testify;

(8) petitioner's grand and petit jury pools did not represent fair cross sections of the community; and

(9) the Missouri death penalty statute is unconstitutional because it permits the prosecuting attorney to exercise unbridled discretion in deciding who will be exposed to the possible sentence of death.

(Amended Petition at pp. 6-17). Respondent contends that each of petitioner's claims is procedurally barred or must otherwise fail on the merits.

Any analysis in this case must begin with the observation that "the qualitative difference of death from all

other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99 (1983) (citations omitted). "[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Indeed this need for a "greater degree of reliability" has resulted in the admonition that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding." Strickland v. Washington, 466 U.S. 668, 704 (1984). (Brennan, J., concurring in part and dissenting in part.) It is with this admonition in mind that the undersigned turns to the case at hand.[4]

Procedural Bar: Claims 1(b), 1(g), 1(h), I(j), 1(j), 1(m), 2(c), 2(g), 3, and 8

Petitioner asserts in claims 1(b), 1(g), 1(h), 1(i), 1(j) , and 1(m) that his trial counsel was constitutionally ineffective because he failed to rehabilitate four venire persons, investigate petitioner's psychological problems, object to the court's instruction regarding mitigating factors, seek a ruling regarding petitioner's participation in the Aryan Brotherhood, avoid introducing evidence regarding petitioner's involvement in the Aryan Brotherhood, and ask venire persons whether they would consider sentencing a

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[4]The undersigned notes that the United States Supreme Court "has vacated the sentence, or has affirmed the vacation of sentence, in roughly half of the death penalty cases in which it has granted certiorari." Mercer v. Armontrout, 864 F.2d 1429, 1431, n.1 (8th Cir. 1988) (citations omitted).

person to life imprisonment rather than death, respectively. Petitioner further asserts in claim 2(c) that the trial court abandoned the agreed-upon practice of examining six venire persons at a time rather than thirteen. Petitioner also asserts in claim 2(g) that he was denied due process because the trial judge erroneously instructed the jurors that they had to be unanimous in the finding of any mitigating factor. In claim 3 petitioner asserts that his rights were violated when the prosecution was permitted to inquire of petitioner and his witnesses regarding their involvement in the Aryan Brotherhood, and in claim 8 petitioner challenges the constitutionality of his grand and petit jury pools. Respondent has asserted that petitioner is procedurally barred from raising these issues in this federal habeas petition because petitioner has never raised these issues in any Missouri state court proceeding, and no Missouri state court has seen fit to remove the bar by addressing the issues on the merits, sua sponte.

Exhaustion of available state remedies is a prerequisite to seeking federal habeas relief. 28 U.S.C. § 2254(b). Thus, a petitioner must fairly present the substance of his federal constitutional claims to the state courts and afford those courts
a full and fair opportunity to apply controlling legal principles
to the facts bearing on his constitutional claims before any federal habeas court may address those claims. Anderson v. Harless, 459 U.S. 4 (1982); Picard v. Connor, 404 U.S. 270, 278 (1971) (federal habeas petition must present substantial equivalent of constitutional claim to state courts). To satisfy the "fair presentation" and "fair opportunity" test, the petitioner must make reference to the United States Constitution, a case addressing the constitutional basis of his claim, or a specific constitutional right. Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir.

1980), cert. denied, 459 U.S. 1175 (1983). It is not necessary, however, that a habeas petitioner cite the "book and verse of the federal constitution." Satter v. Leapley, 977 F.2d 1259, 1262 (8th Cir. 1992). It is only necessary that the substance of the federal constitutional claim be "apparent" on the face of petitioner's state motions and petitions. Id.

Implicit, however, in the exhaustion requirement is the availability of an adequate state remedy. The Court will not require exhaustion where there is a clear manifestation on the record that the state court will refuse to entertain a petitioner's claims. See Snethen v. Nix, 736 F.2d 1241, 1245 (8th Cir. 1984). The issue, then, is whether state law provides an available procedure for determining the merits of the petitioner's claims, not whether the state court would determine the claim favorably or adversely to the petitioner. If there is no available procedure, then petitioner's ostensible state remedies are deemed futile. Id. See also Hampton v. Miller, 927 F.2d 429, 430-32 (8th Cir. 1991).

The Eighth Circuit Court further explained the exhaustion requirement in Smittie v. Lockhart, 843 F.2d 295 (8th Cir. 1988). First, the federal court must determine whether petitioner has fairly presented his federal constitutional claims to the state courts. If not, the court must determine whether exhaustion is nevertheless futile because of the absence of any available procedures or remedies whereby the petitioner can present his federal constitutional claims to the state courts. If there are no available remedies, the court must determine whether the petitioner has demonstrated adequate cause to excuse his failure to raise the claim in state court. If cause for failure

to present the claim is present, the court must then determine whether the petitioner has suffered actual prejudice by the failure of the state court to address his claims. Wainwright v. Sykes, 433 U.S. 72 (1977); Smittie, 843 F.2d at 296; Vasquez v. Lockhart, 867 F.2d 1056 (8th Cir. 1988) (cause and prejudice standard applies where pro se petitioner failed to present his claim in state post-conviction relief proceedings), cert. denied, 490 U.S. 1100 (1989) ; Leggins v. Lockhart, 822 F.2d 764 (8th Cir. 1987) (§ 2254 petitioner must show both cause and prejudice for failure to raise constitutional claims in state court to avoid procedural default bar to federal review of claims), cert. denied, 485 U.S. 907 (1988).

Petitioner asserts that he fairly presented the substance of claim 1(b) herein to the Missouri state courts by alleging as his "5th point relied on" on direct appeal that the trial court committed plain error by sustaining the state's challenge for cause of venire persons Hodge, Baker, Lewis, and Karr. Petitioner's claim 1(b) herein is that his counsel was ineffective because he failed to make a reasonable effort to rehabilitate the four venire persons at issue (Hodge, Baker, Lewis, and Karr).

Petitioner's "5th point relied on" on direct appeal is not the same ground raised in claim 1(b) here. On petitioner's direct appeal he challenged the constitutionality of the practice of "death qualifying" a jury. His case citations on direct appeal purport to support the propositions that:

(a) he was denied a fair trial because a "death-qualified" jury is more "conviction-prone";

(b) "death-qualified" juries are the product of a disproportionate

exclusion of blacks and women from the venire;

(c) by removing persons from the venire who have qualms about recommending sentencing a person to death, the remaining jurors are prejudiced; and

(d) it violates the Missouri Constitution to remove potential jurors based on their religious beliefs.

(Petitioner's Appellate Brief, Resp. Exh. C-1, at 14-16 and 58-60). None of these propositions is remotely related in a constitutional sense to petitioner's allegation in claim 1(b) that he was denied the effective assistance of counsel because his counsel failed to rehabilitate these potential jurors. Petitioner's allegation that he has fairly presented the federal constitutional substance of claim 1(b) to the Missouri state courts does not, therefore, withstand scrutiny.

Petitioner does not contest that he never fairly presented claims 1(g), 1(h), 1(i), 1(j), 1(m), 2(c), 2(g), 3, and 8 in Missouri state court.[5] With respect to all of these claims, with the exception of claim 3, petitioner asserts that he can demonstrate cause and prejudice for his default, however. Petitioner also asserts with respect to claim 1(b), discussed supra, that if he did not in fact present the substance of claim 1(b) to the state courts he can demonstrate cause and prejudice for his failure to do so.

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[5]With respect to claim 2(g), however, plaintiff asserts that "this issue is generic" and has therefore been fairly presented to the Missouri courts. See Traverse at p. 39.

With respect to claims 2(g), 3, and 8, petitioner acknowledges that he has never fairly presented the substance of these claims to the Missouri state courts, but he asserts that he should be permitted to return to state court to address these issues. Petitioner cites Fletcher v. Armontrout, 725 F. Supp. 1075 (W.D. Mo. 1989) in support of the proposition that this court should "refrain from a final ruling upon these matters until petitioner has had a reasonable opportunity" to avail himself of his state remedies. (Traverse at 39 and 47-48).

Turning to petitioner's cause and prejudice arguments first, petitioner asserts with respect to claims 1(b), 1(g), 1(h), 1(i), 1(j), and 1(m) that the ineffective assistance of both his trial counsel and his counsel during post-conviction relief proceedings constituted cause for his default. In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsels efforts" to raise the claim in state court. Murray v. Carrier, 477 U.S. 478, 488 (1986). Objective factors that constitute cause include "interference by officials" that make compliance with the state's procedural rules impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." Ibid. In addition, constitutionally "ineffective assistance of counsel . . . is cause." Ibid. Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. Id., at 486-88. Once the petitioner has established cause, he must show "actual prejudice resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). McCleskey v. Zant, 111 S. Ct. 1454, 1471 (1991). Petitioner appears to misconstrue "cause" in his allegation that ineffective assistance of trial counsel constituted "cause" for his failure to raise claims 1(b), 1(g), 1(h), 1(i), 1(j), and 1(m), which

all themselves raise issues of ineffectiveness, in state court. A general allegation of attorney ineffectiveness does not establish "cause." Petitioner must provide specific "cause" external to the defense for his failure to raise each ground in state court. Stated another way, petitioner has failed to demonstrate how trial attorney ineffectiveness of constitutional dimensions obstructed petitioner from raising any of the claims at issue here in state court. Petitioner's trial attorney ineffectiveness does not therefore establish cause for petitioner's defaults. Petitioner's allegation that ineffective post-conviction relief counsel constituted cause likewise cannot withstand scrutiny because there is no federal constitutional right to counsel for collateral attacks upon a conviction. A state has no obligation to provide post-conviction review and due process does not require the appointment of counsel in such proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555-56 (1987); Shaddy v. Clark, 890 F.2d 1016, 1018, n.4 (8th Cir. 1989) (A petitioner has no sixth amendment right to effective assistance of counsel during a post-conviction proceeding because no sixth amendment right to counsel attaches in collateral attacks upon convictions). Ineffective assistance of post-conviction relief counsel cannot constitute "cause" for a procedural default. Coleman v. Thompson, 111 S. Ct. 2546, 2566-67 (1991). Therefore, to whatever extent petitioner asserts as much, claims 1(b), l(g), 1(h), l(i), 1(j), and 1(m) should be dismissed as procedurally barred.

Petitioner's cause and prejudice analysis with respect to
claim 2(c) goes somewhat further. Petitioner again asserts that the ineffective assistance of trial and post-conviction counsel
constituted cause, without explaining how. Therefore, for the

reasons presented above, petitioners analysis of "cause" with respect to his claim 2(c) default cannot withstand scrutiny. Petitioner also asserts, however, that the "demonstrated impatience of the trial court with the voir dire process contributed to cause" for petitioner's failure to raise ground 2(c) in state court. Petitioner again demonstrates a misconception of the concept of "cause." In order for this Court to entertain a ground which petitioner never presented to the Missouri state courts, petitioner must explain why he never raised the issue when he first appealed his conviction and sentence or when he filed a Rule 27.26 motion and appealed the denial of that motion. The trial court's alleged impatience has no bearing whatsoever on why petitioner failed to raise claim 2(c) in any state court proceeding beyond the initial trial. Petitioner's analysis of cause with respect to claim 2(c) therefore also cannot withstand scrutiny.

Petitioner's final defaulted claims are claims 2 (g), 3, and 8. As discussed previously, petitioner acknowledges that he never raised claims 2(g), 3, and 8 in state court, but he seeks leave of this Court to essentially stay his petition until he has exhausted his state remedies on these claims. The case petitioner cites in support of this proposition, Fletcher v. Armontrout, 725 F. Supp. 1075 (W.D. Mo. 1989), does not mandate a stay in this case.

In Fletcher the Western District of Missouri was confronted with the new role of Missouri Supreme Court Rule 91 in light of new, at that time, Missouri Supreme Court Rules 24.035 and 29.15. The Fletcher court was therefore properly cautious in staying the federal proceedings to allow Fletcher to return to state court, because the new role of Rule 91 was unclear. Indeed, the Fletcher court even certified a question to the Missouri Supreme Court in an effort to obtain guidance on how to

proceed. In the years following Fletcher, however, it has become apparent that Rule 91 is of limited utility, and the reasons that existed in Fletcher to stay habeas proceedings no longer exist. See, e.g., Byrd v. Delo, 942 F.2d 1226, 1229 (8th Cir. 1991) (Rule 91 is not available to raise issues which could have been raised on direct appeal).

In petitioner's claim 2(g) he argues that his rights were violated because the trial judge gave an improper instruction, in claim 3 he argues that his rights were violated at trial when the prosecution was permitted to inquire of petitioner and his witnesses whether they were involved with the Aryan Brotherhood, and in claim 8 petitioner challenges the constitutionality of his grand and petit jury pools. These allegations were certainly apparent to petitioner as soon as they occurred and, thus, could have been raised on petitioner's direct appeal, or in his Rule 27.26 motion. He failed to raise these issues either of those times. Therefore, he would not be permitted to raise the issues in a Rule 91 proceeding, and Rule 91 would be a futile remedy in this situation. See Byrd, 942 F.2d at 1229. Petitioner has not explained how else he might attempt to raise these issues in state court, and so his claims 2(g), 3, and 8 should be denied as procedurally barred.

In summary, petitioner has failed to adequately explain why he never properly raised grounds 1(b), 1(g), 1(h), 1(i), 1(j), 1(m), 2(c), 2(g), 3, and 8 in the Missouri state courts. This Court therefore should recognize that these claims are procedurally barred because petitioner has not provided "cause" for his defaults. Since petitioner has failed to establish "cause" for his
defaults it is unnecessary for this Court to evaluate whether petitioner has established Wainwright prejudice. See, e.g., Ellis v. Lockhart, 875 F.2d 200, 201-02 (8th Cir. 1989).

Claim 1: Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, petitioner first must demonstrate that his attorney failed to exercise the degree of skill and diligence that a reasonably competent attorney would exercise under similar circumstances. This means that petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." Strickland, 466 U.S. at 687; Sanders v. Trickey, 875 F.2d 205, 207 (8th Cir.), cert. denied, 493 U.S. 898 (1989). The petitioner then must demonstrate that he suffered prejudice by his attorney's actions. To show the prejudice required by Strickland, the petitioner must demonstrate that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. The petitioner must not only assert prejudice, but must affirmatively prove that prejudice was present. Id. at 693. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

In Lockhart v. Fretwell, 113 S. Ct. 838 (1993), the Supreme Court clarified that Strickland prejudice is not strictly outcome-oriented, however. The ultimate question is whether the result of the proceeding was unfair or unreliable. In Fretwell the defendant's attorney failed to make an objection supported under the law of the day, but by the time the attorney's effectiveness was at issue that precedent had been overruled. The Supreme Court determined that "the Court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." Fretwell, 113 S. Ct. at 845 (O'Connor, J., concurring).

The reasonable trial strategies of counsel are not reviewable in federal habeas corpus proceedings. See Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir. 1987); Riley v. Wyrick, 712 F.2d 382 (8th Cir. 1983); Wallace v. Lockhart, 701 F.2d 719 (8th Cir.), cert. denied, 464 U.S. 934 (1983); Comer v. Parratt, 674 F. 2d 734 (8th Cir.), cert. denied, 459 U.S. 856 (1982). Strategic choices made by counsel after an investigation of the law and facts relevant to plausible options are virtually unchallengeable in a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 690-91. Defense counsel is presumed to be effective. Cox v. Wyrick, 642 F.2d 222 (8th Cir.), cert. denied, 451 U.S. 1021 (1981). Therefore, petitioner bears a heavy burden in overcoming the presumption that counsel has rendered effective assistance. Howard v. Wyrick, 720 F.2d 993 (8th Cir. 1983), cert. denied, 466 U.S. 930 (1984).

In claim 1(a) petitioner asserts that his counsel was ineffective because he failed to challenge venire person Harris for cause, or remove her from the panel with a peremptory strike, after venire person Harris made comments indicating that she might have difficulty remaining unbiased should it become apparent that petitioner committed the crime while under the influence of alcohol. Respondent argues that, although petitioner has properly raised the issue of whether his counsel was ineffective for failing to challenge Harris for cause in state court, petitioner has never before raised the issue that his counsel was ineffective because he failed to utilize a peremptory strike with respect to Harris, and that, therefore, this claim is procedurally barred, at least in part.

When petitioner filed his amended Rule 27.26 motion with the assistance of counsel on January 26, 1987, he did not distinguish exclusion for cause from exclusion through the use of a peremptory strike. (See Resp. Exh. G

at 13-37). He simply asked the court, in claim 8 (a) (3) of that motion, to find that his counsel was ineffective because he "failed to request the exclusion of juror Helen Harris." (Id. at 15). After his motion was denied petitioner appealed many of the claims raised before the motion court, including claim 8(a)(3), although on appeal his attorney limited the scope of 8(a)(3) to the failure of petitioner's trial attorney to exclude Harris for cause. (See Resp. Exh. H at 24-32). The Missouri Supreme Court expressly limited its discussion of the Harris issue to the question of whether petitioner's "trial counsel was ineffective for not challenging juror Helen Harris for cause." Driscoll, 767 S.W.2d at 7. Respondent's argument is therefore well-taken.

The undersigned nevertheless will recommend that the interests of justice are best served by this Court's reviewing petitioner's claim 1(a) in its entirety. Petitioner attempted to present both aspects of his claim in his amended Rule 27.26 motion. He presented citations to federal law supporting his argument that his counsel was constitutionally ineffective in his handling of venire person Harris. The substance of both aspects of his claim 1(a) were therefore "apparent" in his state proceedings. See Satter, 977 F.2d at 1262. This Court therefore should address the merits of claim 1(a) in its entirety. Alternatively, even if part of claim 1(a) is procedurally barred, the undersigned chooses to address these matters on the merits. See Long v. Iowa, 920 F.2d 4, 6 n.2 (8th Cir. 1990) (when claim lacks merit, court may bypass procedural bar and deny relief on the merits).

On voir dire Mrs. Harris informed the court that her daughter had been killed by a drunk driver twelve years previously. Mrs. Harris explained that she might have difficulty remaining unbiased should it become apparent that petitioner had been drunk at the time of the crime. In

retrospect, petitioner may have been better served had his attorney sought Harris' removal either for cause or by a peremptory strike, but a habeas court does not judge the effectiveness of counsel in retrospect. See Strickland, 466 U.S. at 689. It is the burden of this Court to consider whether petitioner's attorney acted with the skill and diligence at the time that another reasonably competent attorney would have used under the same circumstances. Id.

When petitioner was afforded an evidentiary hearing, pursuant to his Rule 27.26 motion, his trial attorney, Gregory Robinson, was called to testify. (See Resp. Exh. F at 57-94). Robinson first testified with respect to Harris that he did not feel that he could get her excused for cause. The attorney then explained that he thought he could better use his peremptory challenges on others.[6] Most significantly, however, petitioner' s attorney asserted that he believed there would be evidence that some of the prison guards had brought liquor into the prison, and he "thought that if we had a lady like that that was opposed to alcohol on the jury that it might work to our advantage." Petitioner's attorney therefore deliberately opted to keep venire person Harris on the jury. (Resp. Exh. F, Rule 27.26 Hearing Transcript, at 61-62). This was a reasonable trial strategy. This Court should not second-guess the reasonable trial strategy of petitioner's attorneys to retain Harris. See Blackmon, 825 F.2d at 1265. Petitioner's claim 1(a) should therefore be denied because petitioner's counsel committed no error cognizable in this proceeding.

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[6]Numerous venirepersons had close family members who were victims of violent crimes such as murder and rape.

In claim 1(c) petitioner asserts that his trial counsel was ineffective because he both failed to adequately prepare for the
introduction of blood identification evidence at trial and he failed to properly cross-examine Dr. Kwei Lee Su regarding the blood identification testing methodology. Respondent argues that although petitioner has presented the inadequate cross-examination component of claim 1(c) to the Missouri courts, he never presented the inadequate preparation aspect of his claim to those courts, and is therefore procedurally barred from doing so now. The undersigned will recommend that any attempt to distinguish cross-examination from the preparation for such cross-examination is a spurious distinction. This court should reach the merits of both components of petitioner's claim 1(c).

A brief background of some of the evidence presented at trial is necessary to address this claim. On July 3, 1983, petitioner was incarcerated in Housing Unit Two at the Missouri Training Center for Men in Moberly, Missouri. (Resp. Exh. A-3, Trial Transcript, at 904). At approximately 9:45 p.m. on that date a correctional officer, Thomas Jackson, ventured into Housing Unit Two of that facility to attempt to bring out an unruly intoxicated inmate, Jimmy Jenkins. Jenkins refused to comply with Jackson's order to come out, so Jackson returned to the Control Center for assistance. (Id. at 830). While Jackson was obtaining the assistance of two other guards petitioner was busily assembling a "shank," or homemade knife, (State' s Trial Exh. No. 24), f rom parts he had secreted away in his cell. (Id. at 905). When Jackson returned to the housing unit with the two other guards and began escorting Jenkins out, the guards were charged by twenty to thirty inmates. The first two guards were able to reach the safety of the Control Center, but inmate Roy Roberts restrained

Jackson just short of the door. While Roberts held Jackson, petitioner allegedly stabbed Jackson at least once and Rodney Karr,[7] another inmate, allegedly stabbed Jackson at least once, (Id. at 909-913, 872-75), and blood quickly covered Jackson's shirt. While petitioner, Karr, and perhaps others, were stabbing[8] Jackson, correctional officers in the Control Center were frantically struggling to pull Jackson to safety. (Id. at 836-37, 855-57). In the course of these efforts one guard, Officer Harold Maupin, was stabbed in the shoulder. Petitioner was involved in this melee, either as a very close spectator or, as the jury found, an assailant. At some point during the melee, however, petitioner slipped away to change his clothes, which were now extremely bloody. (Id. at 922). Officer Jackson had type 0 blood while Officer Maupin had type A blood. (Resp. Exh. A-4 at 1207).

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[7]Karr's role in the melee remains unclear. Correctional Officer ("CO") Wilson testified that Karr stabbed him in the hand and then stabbed Jackson. Karr was then knocked out by a baseball bat to the head by CO Humphries, and then Wilson discovered Exhibit No. 24 (ostensibly petitioner's knife) on the floor. Wilson believed Exhibit No. 24 was Karr's knife, and no other knife has been connected to Karr. (Trial Transcript at 986-91).

[8]Officer Darnell testified that at the conclusion of the melee he discovered 15-20 knives or other weapons lying around, and three of the knives appeared to be bloody. (Trial Transcript at 1553 and 1571-72). Only Exhibit No. 24 revealed the presence of blood. (Trial Transcript at 1216). Therefore, either Darnell was mistaken, or one or more of the bloody knives was lost.

Dr. Kwei Lee Su, Chief Forensic Serologist with the Missouri State Highway Patrol Crime Laboratory, testified that correctional officer Thomas Jackson's shirt was stained with type 0 blood, the same type of blood possessed by Jackson. Dr. Su further testified that petitioner's prison pants were also stained with type 0 blood. Dr. Su indicated that the knife identified as State's Exhibit No. 24, the alleged murder weapon, had type A blood on it. The prosecution attempted to get Dr. Su to explain that the reason that the weapon allegedly used to kill Jackson had no type 0 blood on it was that either the type 0 blood somehow got wiped off when petitioner stabbed Officer Maupin or the type 0 blood was "masked" from the testing by the presence of type A blood. (Resp. Exh. A-4 at 1207-09). In fact, this was a gross over-simplification, as Dr. Su clarified to some extent.[9]

Dr. Su explained that blood can be type A, type B, type AB, or type 0. When a "thread" or "antigen" test is performed, a reagent called anti-A is added to the blood and agglutination, or clumping, occurs if the blood is type A. Similar reagents signal the presence of type B or Type AB blood, but the presence of type 0 blood is signaled only by the non-reaction or non- agglutination of the blood when Anti-A and Anti-B are added to the blood. (Id. at 1210-12). Thus, when type A and type 0 blood are mixed, the antigen test will not reveal the presence of the type 0 blood, because agglutination showing type A will occur. (Id. at 1212). Dr. Su testified that with the "antigen" test type A blood "masks" the presence of type 0 blood. Id. at 1212-13. Dr. Su was never asked, either on direct or

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[9]When confronted with the hypothetical that the knife had stabbed a type 0 person then a type A person, Dr. Su stated that the "majority" of the blood on the knife should be type A. (Id. at 1208).

cross-examination, whether other blood identification methods were used or were available to be used to identify the presence of type 0 blood with any degree of certainty. The only question petitioner's attorney asked on cross-examination was whether all that Dr. Su could say with any degree of medical certainty was that Exhibit No. 24 had type A blood on it, and whether "anything else would just be speculation," to which she agreed. (Id. at 1217).

In fact, as was established at the Rule 27.26 hearing, another test had been performed on the knife, called the "Lattes" antibody test. This test likewise can determine the presence of each type of blood, but no "masking" can occur under the Lattes method. Using this test, Dr. Su discovered no type 0 blood on the knife, but the jury was never informed that the Lattes test was used, or that no type 0 blood was found on the knife. (Resp. Exh. F, Rule 27.26 Hearing Transcript at 29-30). At the Rule 27.26 hearing Dr. Su was asked: "If you had been asked at trial regarding the antibody test, you could have testified that there was no 0 blood on that knife," to which she answered "yes." (Resp. Exh. F at 32.) She also was asked if she could not have testified that there had not been type 0 blood on the knife "at some time." Her response was, "It was not detected, if it was there." (Id.)

The jury was left with the impression, however, that Exhibit No. 24 definitely had been exposed to both type A and type 0 blood, but the type 0 blood was not discerned either because its presence was "masked" by type A blood[10]

[10]If only an antigen test had been performed on the knife it would be reasonable to conclude that, although type 0 blood may have been on the knife, its presence was masked by the existence of type A blood. The fact

or the type 0 blood was simply removed from the knife when Officer Maupin was stabbed. (See also Resp. Exh. A, trial testimony of Simmerman at 1862-63). This, too is not necessarily true, and may in fact be completely false, but petitioner's attorney asked not a single question to refute this "wipe-off" theory. See, e.g., Davis v. Blackburn, No. 87-0487, 1987 U.S. Dist. LEXIS 7618 at *11 (E.D. La. August 18, 1987) (knife seized from a defendant revealed presence of both type A and type 0 blood upon testing); United States v. MacDonald, 640 F. Supp. 286, 311 and 314 (E.D.N.C. 1985) (forensic testing revealed both type A and type AB blood on a club and mixing of type A and type O blood on bed linen); Brown v. Commonwealth, 381 S. E. 2d 225, 226 (Va. 1989) (knife had mixture of type of blood); People v. Henderson, 404 N.E.2d 392, 399 (Ill. App. Ct. 1980) (both type A and type 0 blood found on the same knife); People v. Fetterman, 302 N.E.2d 218, 225 (Ill. App. Ct. 1973) (mixture of type A and type B blood found on glass shards in a pool of blood). See also People v. Roy, 255 Cal. Rptr. 214, 217 (Cal. Ct. App. 1989) (mixing of blood types on a knife may result in an

remains, however, that the antigen test was not the only test performed on the knife. Because the Lattes test revealed no 0 blood, it was misleading to leave the jury with the impression that 0 blood was, in fact, on the knife, but its presence was masked.

The Missouri Court of Appeals focused only on the antigen test. It acknowledged the existence of the Lattes method, but made no finding whether counsel should have further investigated the interplay between the two tests. Rather, the Court found that, because there was so much evidence of plaintiff's quilt, any errors counsel made could not have prejudiced plaintiff. See Driscoll, 767 S.W.2d at 7-8.

incorrect reading of the blood types present); Cook v. State, 451 S.W.2d 473, 476 (Ark. 1970) (type 0 blood can appear to be type A blood under some tests).

At the Rule 27.26 hearing petitioner's trial counsel agreed that he had received the test results (Resp. Exh. F at pp. 74-75). Those results apparently did not specify each of the tests performed, but only the results of the tests, that is, that the tests showed only type A blood on the knife. Defense counsel testified that he knew that there was a blood type other than the murder victim's on the knife, and so to that extent the testimony helped his case. He stated: "That was my basic approach to the knife and the blood, yes. I didn't see how it was going to hurt me." (Resp. Exh. F, at 91.) Counsel testified he was not aware of any scientific evidence that could have rebutted the state's "masking" argument. (Id. at 92.) He did not interview Dr. Su before her trial testimony, and he did not know of any other tests that could have been performed on the knife. (Id. at 74.)

The only reasonable conclusion that may be reached from this evidence is that petitioner was the victim of ineffective assistance of counsel because his counsel failed to acquaint himself with blood testing procedures, failed to discover that two different tests had been performed on the knife, failed to cross-examine Dr. Su regarding the Lattes method and the fact that no "masking" could occur with that method, and failed to present the jury with the crucial evidence that the testing under the Lattes method revealed no 0 blood. This line of cross- examination could have rebutted, or at least called into question, the state's "masking" argument, but it was not pursued, and counsel did no investigation to educate himself regarding any possible challenge to the "masking" argument. "Reasonable performance of counsel includes an adequate investigation

of facts, consideration of viable theories, and development of evidence to support those theories . . . Although one generally gives great deference to any attorney's informed strategic choices, one closely scrutinizes an attorney's preparatory activities." Foster v. Lockhart, 9 F.3d 722, ___, Nos. 92-3702EA and 92-3884EA, slip op. at pp. 6-7 (8th Cir. November 19, 1993). Counsel thus, in effect, assisted the prosecutor in leaving the jury with the mistaken impression that although type 0 blood may have been on the knife, its presence was "masked" by the type A blood.

The prosecutor, as discussed earlier, offered as an alternative explanation for the absence of type 0 blood on Exhibit No. 24, that it somehow got wiped off by petitioner's stabbing the officer with type A blood. Dr. Su said this was possible in her trial testimony, (see Trial Transcript at 1208-09), but at the Rule 27.26 hearing she recanted this position. Twice Dr. Su was asked by the prosecutor whether, by stabbing two different people, the second stabbing would clear the blood of the first from the knife. The first time she responded, "I cannot say a yes or no on that. I don't know." The next time she said, "I really can't answer that either. I'm sorry." (Resp. Exh. F, Rule 27.26 Hearing at 32). Again, the lack of effective cross-examination at trial prejudiced defendant's case, because at trial Dr. Su's testimony appeared to unequivocally support the argument that the "wiping" theory was possible. At the hearing, upon more questioning, she clearly equivocated and backed away from that position, which indicates that she may well have done so at trial if faced with effective cross-examination. Whether characterized as ineffective assistance of counsel or a due process violation in its own right, the introduction of this testimony in the manner presented violated petitioner's constitutional rights.

Petitioner is entitled to a new trial on the basis of claim 1(c).

In claim I(d) petitioner asserts that his counsel was ineffective because he failed to object to at least[11] five instances of prosecutorial misconduct. Petitioner specifically asserts that his counsel was ineffective in failing to object to (i) the prosecutor's arguments regarding the fact that they only bring guilty people to trial, (ii) the prosecutor's comment that Mr. Jackson's wife thanked the jury, (iii) the prosecutor's placing incompetent evidence before the jury, (iv) the prosecutor's comments regarding "assurances of special knowledge," and (v) the prosecution's repeated attempts to diminish the degree of responsibility the jury might feel in recommending a sentence of death.

Turning first to petitioner's subclaims designated herein as (iii) and (iv), petitioner has not provided any factual support for his conclusory allegations. "In order to warrant relief . . . a habeas corpus petitioner must allege sufficient facts to establish a constitutional claim. Mere conclusory allegations will not suffice." Wiggins v. Lockhart, 825 F.2d 1237, 1238 (8th Cir. 1987), cert. denied, 484 U.S. 1074 (1988), citing Allard v. Nelson, 423 F.2d 1216, 1217 (9th Cir. 1970). See also Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990) (mere conclusory allegations fail to state a constitutional claim for habeas relief). These subclaims accordingly do not warrant further review.

In petitioner's first subclaim within claim 1(d) he alleges that his counsel was ineffective because he failed to object to various comments made by the prosecution during closing argument that seemed to undermine the presumption

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[11]See fn. 1, supra.

of innocence. Petitioner specifically takes umbrage with the following comments:

> (1) "No one has tried to make Robert a scapegoat -- nobody. We took five months to pour over the reports -- all of them -- before a decision was made -- giving them the benefit of every possible doubt."

(Trial Transcript at 2107).

> (2) "And let me tell you something from the Missouri Attorney General's office -- we've got better things to do than go try

people who are not guilty. We've got more important things to do."

(Id.)

In petitioner's second subclaim within claim 1(d) he alleges that his counsel was ineffective because he failed to object to comment by the prosecutor during closing that he had spoken to the victim's widow and she thanked the jury. (See Trial Transcript 2112-13).

Both of these subclaims raise allegations that the prosecutor engaged in improper closing argument. In Darden v. Wainwright, 477 U.S. 168, 179-83 (1986), the Supreme Court determined the standard of review when a habeas petitioner alleges that the prosecution engaged in improper closing argument. The Court noted that "it is not enough that the prosecutor's remarks were undesirable or even universally condemned." Id. at 181. Rather, "[t]he relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" Id. at 642. Darden, 477 U.S. at 181.

While the three comments at issue here were questionable, they certainly did not render petitioner's entire trial unfair. The three comments must be viewed in the context of the entire trial, and so viewed, do not warrant habeas relief. See also Davis v. Wyrick, 766 F.2d 1197, 1202-03 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

Petitioner's final subclaim in claim 1(d) alleges that petitioner's counsel was ineffective because he failed to object to repeated efforts by the prosecution to diminish the degree of responsibility the jury might feel in recommending a sentence of death. Petitioner specifically takes umbrage with the following statements by the prosecution during voir dire:

(a) "But when you've returned a verdict of -- say a recommendation of death, you each have an individual vote. But also, the judge has a vote. Do you understand that? In other words, it takes thirteen." (Trial Transcript, Resp. Exh. A-2, at p. 481).

(b) "Now, is there any question about the fact that a jury who returns a verdict of a recommendation of death, that it's only a recommendation to the Court, who later sentences a defendant? Does everybody understand that? Okay. Because juries don't sentence people to death in Missouri. So you understand that? Okay." (Id. at p. 482).

(c) "And you have to find one of the statutory aggravating circumstances before you ever reach the issue of whether or not you can consider recommending to the Judge that he consider imposing a sentence of death at sentencing." (Id. at p. 540).

(d) "Now, lest you get another misconception -- you're not the only ones voting

as jurors. The Judge has a vote. It's really thirteen votes. But the Judge's vote is a veto vote. It doesn't matter whether you return a recommendation for the death penalty. The Judge can overrule you and still give the defendant fifty years in prison without parole -- after looking more in the defendant's background, et cetera -- those kinds of things." (Id. at p. 555, emphasis added).

(e) For similar statements during voir dire, which went without objection, and which petitioner asserts show a scheme or plan on the part of the prosecutor to lessen the jury's feeling of responsibility or gravity with regard to the imposition of punishment, petitioner refers the Court to the following additional pages and lines in the transcript, which generally again contained the assurance that the jury's decision was only a "recommendation" and the final decision would be up to the judge. See id. at pp. 480, 481, 482, 483, 512, 519, 520, 533, 534, 538, 542, 577, 606, and 607.

Petitioner asserts that this pattern continued in closing argument:

(f) "Furthermore, the evidence will show -- or has shown -- based on the prior evi- dence that, in fact, the State has proved the aggravating circumstances necessary for you to move to your consideration as to whether or not

defendant should be recommended to the Judge to consider whether or not to sentence defendant to death." (Trial Transcript, Resp. Exh. A-6, at p. 2003).

(g) "The recommendation which you will make will be no more than a recommendation so that the Judge can consider when he is determining in his mind whether or not to sentence Driscoll to death -- he'll have that option." (Id. at p. 2004).

(h) "Well, I'll tell you. What's going to happen to Bobby Driscoll is it's going to depend what the Judge does. And it's -- in a way, its certainly going to depend on what you do." (Id. at 2103, empha- s i s added) .

(i) "The decision is difficult, but the decision to give the Judge the oppor-tunity to consider both options is compelling." (Id. at p. 2106) .

(j) "And you understand when I say 'impo- sing', what you're doing is recommending to Judge Long to consider it?" (Trial Transcript, Resp. Exh. A-2 at p. 580).

Petitioner's trial counsel never objected to any of these references at trial. Respondent acknowledges that petitioner has raised this claim of ineffective assistance

properly in state court. Respondent asserts, however, that petitioner's claim must fail on the merits.

The first question, then, is whether the prosecution said
anything inappropriate, or incorrect, as a matter of law. Guidance in answering this question may be found in Caldwell v. Mississippi, 472 U.S. 320 (1985).[12] See also Dugger v. Adams, 409 U.S. 401, 109 S. Ct. 1211, 1215 (1989) (it is a Caldwell violation for the prosecutor to make comments which "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision"). Caldwell a man was convicted of killing a store owner in the course of robbing his store. Defendant's attorneys presented mitigating evidence and then, in closing, argued that Caldwell:

> has a life that rests in your hands. You can give him life or you can give him death. It's

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[12]Petition for certiorari in Caldwell was granted on October 9, 1984. Caldwell v. Mississippi, 469 U.S. 879 (1984). The case was argued on February 25, 1985, and decided on June 11, 1985. Voir dire in the case sub judice, began on November 26, 1984, while Caldwell was thus pending before the Supreme Court, and the case sub judice did not become final until the Supreme Court denied certiorari on October 20, 1986, Driscoll v. State, 479 U.S. 922 (1986), after Caldwell was decided. Respondent has not contested the applicability of Caldwell and its progeny under these circumstances. (See Response at pp. 31-35.) Cf. Sawyer v. Smith, 497 U.S. 227 (1990) (addressing the question of when and whether Caldwell announced a "new rule'").

> going to be your decision . . . an eye for an eye is not the solution . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know -- an awesome responsibility.

Caldwell, 472 U.S. at 324. In response, the prosecutor sought to minimize the sense of responsibility Caldwell's attorneys had placed on the jurors' shoulders. The prosecutor argued:

> I don't think it's fair . . . I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable . . . (Defense counsel objected and the Court interceded.)
>
> The Court: . . . I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that infor-mation is now needed by the jury so they will not be confused.
>
> Prosecutor: Throughout their remarks, they tried to give you the opposite, sparing the truth. They said, "Thou shalt not kill." If that applies to him it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I

know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court . .

Caldwell, 472 U.S. at 325-26. The United States Supreme Court vacated the death penalty imposed in the case, holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-29.

Respondent attempts to distinguish Caldwell, asserting that while in Caldwell the prosecutor's statements were inaccurate statements of the law, the prosecutor's statements in petitioner's case "were not clearly inaccurate statements of law." (Response at 31-35 and 59-65). In fact, the Justices in Caldwell focused on not only the unconstitutionality of the prosecution's giving misinformation to the jury, but the unconstitutionality of the prosecution's giving the jury information which, although accurate on its face, diminished the jury's sense of its real responsibility. The Caldwell court explained in great depth why suggestions must not be made to jurors that minimize their sense of responsibility. First, a jury must not be given the sense that the ultimate sentencing decision rests in the appellate courts, because that simply is not the law; "most appellate courts review sentencing determinations with a presumption of correctness." Caldwell, 472 U.S. at 330-31. Second, even if the jury is unconvinced that the death penalty is appropriate, if it is led to believe that its recommendation carries little weight, it may try to "send a message" of its extreme disapproval of the defendant's acts, confident that its recommendation will not be followed. Third, jurors may try to maximize the discretion of those who "really" make the decision. They may recommend a

death sentence as a way of avoiding making any decision at all, if they think that the death sentence really means life imprisonment or death as a later decision maker may choose. The Supreme Court characterized this last problem as one of the jury's "delegating" its responsibility. Id. at 332-333.

In the instant case, the prosecutor's remarks clearly and repeatedly conveyed to the jury this concept of delegation, that
is, by assuring the jurors that their finding on the death penalty
was really just a recommendation and the judge could do whatever he chose in sentencing, the prosecutor improperly suggested to the jurors that by recommending death, they were simply allowing the judge to exercise his discretion on the full range of sentencing options. The effect such arguments might have in the jury room on a juror disinclined to recommend the death penalty was a concern recognized by Caldwell. The prosecutors argument, that it really "doesn't matter whether you return a recommendation for the death penalty" (see Trial Transcript at p. 555), could be used to pressure a reluctant juror to recommend death. The Supreme Court acknowledged that jurors presented with such a situation may simply defer their responsibility. Caldwell, 472 U.S. at 333.

As the Caldwell Court noted, almost every state supreme court that has addressed the issue has condemned any efforts to convey a diminished sense of responsibility in capital sentencing. Caldwell, 472 U.S. at 333 n. 4. See Ward v. Commonwealth, 695 S.W.2d 404, 408 (Ky. 1985) (Kentucky law forbids prosecutor's attempt to diminish jury's sense of responsibility by describing jury's death sentence as "only a recommendation" even though such a characterization is technically accurate); Ice v.

Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984) (prosecutor's references to jury's sentencing decision as recommendation impermissible under law of commonwealth), cert. denied, 469 U.S. 860 (1984); State v. Willie, 410 So. 2d 1019, 1034 (La. 1982) (prosecutor's argument that jury's decision was not final lessened its "awesome responsibility" and required reversal under state law).

Although the improper remarks in the instant case referred to review by a trial judge as opposed to appellate review, the evils Caldwell sought to eradicate are equally intolerable at the trial court level. See Ward, 695 S.W.2d at 408 (prosecutor impermissibly sought to divert jury from responsibility by telling jury that trial judge had ultimate sentencing role); State v. Tyner, 273 S.C. 646, 659, 258 S.E.2d 559, 565-66 (1979) (death sentence invalid where prosecutor argued that trial court would review any recommendation of death). The dangers Caldwell sought to prevent are just as pronounced at the trial court level when a jury is told that the trial judge will review its decision and make the ultimate sentencing decision. The prosecutor's statements in the case at hand posited the trial judge as the ultimate sentencing authority in a manner which clearly mislead the jurors as to the import of their sentencing recommendation.

Respondent contends that such statements accurately characterize the divided roles of judge and jury in light of Missouri Supreme Court Rule 29.05, which provides that "[t]he court shall have power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive." Thus, respondent argues that Caldwell is distinguishable from the instant case because the prosecutor's statements were descriptively correct statements of the law. However, the fact that a

comment or instruction was facially accurate has been rejected as an exception to the general prohibition against diminishing the jury's sense of sentencing responsibility by most courts that have actually reached the merits of this issue. See Dean v. Commonwealth, 777 S.W.2d 900, 907 (Ky. 1989); Ward v. Commonwealth, 695 S.W.2d 404, 408-09 (Ky. 1985); Wiley v. State, 449 So.2d 756, 762 (Miss. 1984); Ice v. Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984); but see State v. Rogers, 504 N.E.2d 52, 57-58 (Ohio 1986).

Missouri's capital statute allows a death sentence only if the jury votes for death, unless the defendant has requested sentencing by the court. Mo.Rev.Stat. §565.006 (Supp. 1982). All relevant factors in mitigation or aggravation are presented for the jury's consideration. Mo.Rev.Stat §565.012.2 (1979). The statute further provides that if the jury imposes the death penalty, it must state in writing the aggravating circumstances that it finds beyond a reasonable doubt, Mo.Rev.Stat §565.012.4 (1978), and the jury must be convinced beyond a reasonable doubt that the death penalty is appropriate. Although the trial judge is authorized, at her discretion, to reduce a recommendation of death to a life sentence,[13] the judge may not increase a life sentence to a death sentence. A defendant can only receive a capital sentence if the jury has first recommended such punishment to the trial judge. It is, accordingly, an inaccurate characterization of the law for

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[13]The undersigned notes that one study reports that since the death penalty was reenacted in the late 1970s in Missouri "no judge has ever spared a convicted murder of the death penalty when a jury has recommended it." William C. Lhotka, Judges Back Juries on Death Penalty, St. Louis Post-Dispatch, December 6, 1992, at 9C.

the prosecutor to tell the jurors that their sentencing role "doesn't matter." (See Trial Tr. at 555.) Representing to the jury that "it doesn't matter whether you return a recommendation for the death penalty" is grossly misleading and runs afoul of the broad mandate of Caldwell that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell, 472 U.S. at 328-29. Here the jury was undoubtedly led to believe that the ultimate sentencing responsibility rested not upon itself, but with the trial judge. Stated another way, petitioner's jury was given the incorrect impression that the trial judge's review was de novo. (See Trial Tr. at 481 where the prosecutor characterizes the trial judge as the thirteenth juror.) This is an incorrect statement of Missouri law. Faced with its diminished sentencing role, this jury was necessarily prone toward the same death-bias against which the Court warned in Caldwell.

The Eighth Circuit has not considered the merits of a Caldwell challenge where, as here, prosecutors blatantly attempted to diminish the jury's sense of responsibility. The closest case was Gilmore v. Armontrout, 861 F.2d 1061 (8th Cir. 1988). There the jury had been asked by the prosecutor, during the punishment phase of the trial, to consider the fact that if the jury did not recommend the death penalty, the legislature could shorten Gilmore's sentence, or the Governor could commute the sentence. Gilmore challenged this argument, under the authority of Caldwell, in a § 2254 proceeding. The Eighth Circuit found the Caldwell claim procedurally barred. The court nevertheless discussed the merits of the claim as follows:

> Gilmore's reliance upon Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) , in support of his assertion that the prosecutor's remarks warrant habeas relief, is misplaced. Caldwell condemns state-induced comments that "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Darden v. Wain-wright, 477 U.S. 168, 184 n.15, 16 S. Ct. 2464, 2473 n-15, 91 L. Ed. 2d 144 (1986). The comments in the case at hand, supra n.4, did not mislead the jury; rather, they accurately apprised it of the potential consequences of its sentencing alternatives. Moreover, the com-ments in no way tended to diminish the jury's role in the sentencing determination; on the contrary, a fair reading of the prosecutor's closing argument leads one to conclude that the remarks at issue underscored the importance of the jury's decision.

Gilmore, 861 F.2d at 1066. The Court went on to say that, under California v. Ramos, 463 U.S. 992 (1983), it is not improper to inform a jury of the potential of sentence commutation. Id. at 1066-67. Finally, the Gilmore court noted that the trial judge submitted a curative instruction[14] which reduced the likelihood that the jury was substantially

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[14]The jury in the case sub judice was instructed that opening statements (Instruction No. 2) and closing arguments (Instruction No. 11) are not evidence. The Gilmore court reserved comment on whether such an instruction could cure a Caldwell violation. Gilmore, 861 F.2d at 1067.

influenced by counsel's comments. Id. at 1067. In 1989, the Eighth Circuit declined to rehear Gilmore, en banc. Three judges dissented. Judge McMillian, writing for the dissenters, argued that the prosecutor's argument was misleading and an inaccurate statement of the law. Gilmore v. Armontrout, 867 F.2d 1179, 1181-83 (8th Cir. 1989). Never before has the Eighth Circuit been confronted with a habeas petitioner who, like petitioner here, has properly exhausted all of his state mechanisms for relief and who has been prejudiced by a prosecutor's efforts to diminish the jury's sense of responsibility as in Caldwell. See also Bannister v. Armontrout, 4 F.3d 1434, 1444 (8th Cir. 1993).

Capital juries must maintain a strong sense of responsibility toward their sentencing decisions regardless of whether the jury is imputed with the task of actually fixing the sentence or making a "mere" recommendation to the court. Although the Missouri trial judge is not bound by the jury's recommendation if she finds it to be "excessive," she is certainly affected by it. The Supreme Court in Caldwell recognized the constitutional dimension, of these concerns. That petitioner's trial counsel could fail to raise the issues or object to any of the repeated references and suggestions by the prosecutor must lead to the conclusion that counsel's performance was not the effective assistance required by the sixth amendment. Respondent contends that it was a viable trial strategy for petitioner's attorney to refrain from objecting to the prosecution's use of the word "recommend." Petitioner's attorney, however, testified that he did not realize that the use of the word "recommend" was objectionable. (See Resp. Exh. F at p. 82.) Counsel's failure to raise a Caldwell objection cannot be called strategy when he erroneously concluded that the prosecution was doing nothing wrong. The force that the jury's recommendation exerts upon the trial judge is sufficient to

show that petitioner was prejudiced by his counsel's failure to provide effective assistance. The undersigned will accordingly recommend that this constitutional violation requires that petitioner's sentence be vacated and he receive a new sentencing hearing.

In claim 1(e) petitioner asserts that his counsel was ineffective because he failed to request or obtain a jury instruction on second degree felony murder under § 565.004 R.S.Mo. (1939) (repealed effective September 28, 1983). Petitioner's jury was instructed on the elements of capital murder as well as the elements of conventional second degree murder (intentional murder without deliberation) but petitioner's jury was not instructed on the elements of second degree felony murder (murder during the commission of a felony other than burglary, arson, kidnapping, rape, or robbery (see § 565.003 R.S.Mo. (1977)). Petitioner has not informed the Court of what felony, other than burglary, arson, kidnapping, rape, or robbery, he was ostensibly committing which necessitated a second degree felony-murder instruction. The undersigned notes that petitioner satisfied the elements of § 217.385 (R.S. Mo. 1982), offering violence to a correctional officer, if petitioner stabbed Maupin.[15]

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[15]As of the date of Officer Jackson's murder Missouri recognized the following misdemeanors which plaintiff may also have committed: Peace Disturbance (§ 574.010, R.S.Mo., 1977), Unlawful Assembly (§ 574.040, R.S.Mo. 1977), Rioting (§ 574.050, R. S.Mo., 1977), and Refusal to Disperse (§ 574.060, R.S.Mo. 1977). Missouri also recognized the common law doctrine of misdemeanor-manslaughter, otherwise known as the unlawful act doctrine. See, e.g., State v. Light, 577 S.W.2d 134 (Mo. Ct. App. 1979). Under this doctrine the incidental and unintentional homicide of another, during the

Furthermore, by offering violence to Maupin plaintiff became a participant in the riot, and thus, arguably, a participant in the killing of Jackson, although plaintiff arguably had no intent to do anything more than offering violence to Maupin.

The question before this Court is therefore whether petitioner's attorney was ineffective for failing to request that the jury be instructed on the elements of second degree felony murder as well as second degree conventional murder. The Supreme Court has held that "the federal rule is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find (the defendant) guilty of the lesser included offense and acquit him of the greater.'" Hopper v. Evans, 456 U.S. 605, 612 (1982), quoting Keeble v. United States, 412 U.S. 205, 208 (1973); Beck v. Alabama, 447 U.S. 625, 638 (1980). As discussed, supra, only type A blood was found on petitioner's knife, State's Exhibit No. 24. The murder victim had type 0 blood. The evidence could be viewed to support the conclusion that although petitioner stabbed Maupin, he did not stab Jackson, nor did he have any intent to stab Jackson. A rational jury therefore still could have found petitioner guilty of felony-murder as a participant in Jackson's death, but not guilty of capital murder. The jury should have at least been given that option. See Wiggerfall v. Jones, 918 F.2 1544, 1545-51 (11th Cir. 1990) (Beck violation warranted granting habeas relief); Vickers v. Ricketts, 798 F. 2d 369, 371-74 (9th Cir. 1986) (same), cert. denied, 479 U.S. 1054 (1987).

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perpetration of a misdemeanor, was manslaughter. Id. at 136. For the reasons set forth above a misdemeanor-manslaughter instruction was thus warranted.

Respondent seems to argue that by giving a conventional second degree murder instruction the Court was relieved of its obligation to give the second degree felony murder instruction (and petitioner's counsel was accordingly relieved of his obligation to ask for it). Although respondent has provided no authority to support this proposition (that the reading of any jury instruction on a lesser included offense satisfies Beck) , there are cases which support such a reading of Beck. See, e.g., Montoya v. Collins, 955 F.2d 279, 285-86 (5th Cir. 1992) (Beck requires only that juries not be confronted with an all-or-nothing choice in capital cases), cert. denied, 113 S. Ct. 820 (1992). The undersigned will recommend that the most credible interpretation of Beck is that juries should be instructed on every lesser included offense whose elements are supported by the evidence.[16] The offenses are distinct, and not mutually exclusive. Both instructions were warranted. A reasonably competent attorney in the position of petitioner's counsel would have sought a lesser included

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[16]Montoya is distinguishable from the case at hand because Montoya's request for an instruction on involuntary manslaughter was not supported by the evidence. The Eighth Circuit cases interpreting Beck and Hopper, Rapheld v. Delo, 940 F.2d 324, 327 n.5 (8th Cir. 1991), cert. denied, 112 S. Ct. 984 (1992), Blair v. Armontrout, 916 F.2d 1310, 1325-30 (8th Cir. 1990), cert. denied, 112 S. Ct. 89 (1991), Williams v. Armontrout, 912 F.2d 924, 928-30 (8th Cir. 1990), cert. denied, 111 S. Ct. 1092 (1991), and Stokes v. Armontrout, 851 F.2d 1085, 1094 (8th Cir. 1988), cert. denied, 488 U.S. 1019 (1989), are distinguishable for the same reason. Pitts v. Lockhart, 911 F.2d 109, 112 (8th Cir. 1990), cert. denied, 111 S. Ct. 2896 (1991), on the other hand, is distinguishable because it was rendered a non-capital case when the death penalty was not imposed.

instruction for felony murder (and also misdemeanor-manslaughter as discussed at footnote 14). Petitioner was prejudiced by his attorney's omissions because he was sentenced to death when the death penalty would not have been a possible option under the lesser included instructions. Petitioner has accordingly demonstrated his counsel's ineffectiveness under Strickland and Fretwell.

In claim l(f) petitioner asserts that his counsel was ineffective because he failed to present mitigating evidence that petitioner had saved the life of another prisoner while petitioner was incarcerated in California. Evidence that petitioner saved another prisoner's life did in fact come to light during petitioner's trial. (See Trial Transcript, Resp. Exh. A-6 at 2057-58). A California prisoner attempted to commit suicide by self-immolation and petitioner intervened. Petitioner's complaint therefore cannot be that the jury was unaware of his heroics. Rather, petitioner's argument must be that counsel failed to corroborate this fact with supporting documentation which was in the possession of the California Department of Corrections, or by calling the other prisoner to testify.

Petitioner never informed his counsel before trial that he had saved a man's life. Indeed, he never told counsel this fact before he testified at trial. It came as a complete surprise to petitioner's attorney. (See Trial Transcript, Resp. Exh. A-6 at 2125; Resp. Exh. F at p. 62). Petitioner's attorney made the most of this testimony once he was made aware of it, but he cannot be said to have been deficient in not ferreting the information out sooner. It was petitioner's burden to bring such information to his attorney's attention. See Kramer v. Butler, 845 F.2d 1291, 1294 (5th Cir. 1988) (trial attorney cannot be found ineffective for failing to pursue a line of inquiry where the

petitioner fails, to bring the line of inquiry to the attorney's attention), cert. denied, 488 U.S. 965 (1988). Petitioner's claim l(f) should therefore be denied because petitioner has failed to demonstrate that his counsel failed to exercise the degree of skill and competence a similarly situated attorney would have exercised. See also Russell v. Jones, 886 F.2d 149, 152 (8th Cir. 1989) (trial attorney who, arguably, was never informed of a possible defense, should be accorded "heavy deference" with regard to what she should have investigated). Alternatively, even if, arguendo, counsel was remiss in failing to discover petitioner's heroic endeavor in the California penal system, petitioner's claim should nonetheless fail because petitioner has not demonstrated that but for counsel's error, he would not have been sentenced to death. Evidence that petitioner saved another person's life was presented to the jury, and used to petitioner's advantage in closing argument. Petitioner has not demonstrated Strickland prejudice. See Strickland, 466 U.S. at 687. His claim 1(f) should therefore be denied.

In claim l(k) petitioner asserts that his counsel was ineffective because he failed to impeach the testimony of Joseph Vogelpohl with evidence that Vogelpohl had made prior inconsistent statements. Shortly after the riot Vogelpohl was interviewed by two different investigators. Mark Schreiber recalled on April 24, 1987 that in the initial interview (which took place in July of 1983, shortly after the incident) that Vogelpohl told him that when petitioner returned to cell 410 petitioner told Vogelpohl that Officer Jackson had been stabbed. (Resp. Exh. F, Rule 27.26 Motion Hearing Transcript at 19). Mr. Schreiber took notes of the Vogelpohl interview and noted that petitioner said to Vogelpohl "one of the officers, which was Officer Jackson, had been stuck." (Id. at 21). Vogelpohl did not tell Schreiber at that time that petitioner admitted stabbing anyone. Nor did Vogelpohl tell Schreiber that he personally

saw petitioner stab anyone. Also in July of 1983, Kenneth Wilkinson interviewed Vogelpohl and Vogelpohl led Wilkinson to believe that petitioner had told Vogelpohl that petitioner "took out one of the guards." (Id. at 11). Mr. Wilkinson and his team of investigators interpreted Vogelpohl comment to mean that "Mr. Driscoll was saying that he or someone took out one of the guards." (Id. at 15). Vogelpohl did not tell Wilkinson that petitioner admitted stabbing Jackson. Nor did Vogelpohl tell Wilkinson that he personally saw petitioner stab anyone. At trial Joseph Vogelpohl testified that he saw "Robert Driscoll stick Thomas Jackson." (Trial Transcript, Resp. Exh. A-3, at p. 909). Vogelpohl further testified that he saw petitioner "plunging the knife into (Jackson's) left upper chest . . . I seen him plunge the knife into him a couple of times, but I only seen the knife actually go into him once." (Id. at 909-910). Vogelpohl also testified that after the fight petitioner returned to Room 410 where Vogelpohl was located, although it was not his cell, and
petitioner stated to Vogelpohl, "Did I take him out, JoJo, or did I take him out?" Petitioner then changed his clothes. (Id. at 914 and 922-23).

On cross-examination petitioner's attorney established that Vogelpohl had consumed 64 ounces of homemade alcohol, brewed by the inmates from "sugar, yeast, and some kind of fruit juice with high acid" prior to observing the riot. (Id. at 945-46, 912). Petitioner's attorney confirmed that Vogelpohl was "feeling high" when he observed the riot, although Vogelpohl would not admit to being drunk. (Id. at 946). Vogelpohl did admit that he had twice received treatment for alcoholism, but refused to consider himself an alcoholic. (Id. at 952). Petitioner's attorney thus was able to effectively ascertain that Vogelpohl's "perception could have been distorted." (Tr. at 946.) Petitioner's attorney also ascertained that Vogelpohl

left the scene of the murder while the fight was still going on, further diminishing Vogelpohl's credibility. (Tr. 948.) Petitioner's attorney also raised some serious questions regarding when or whether Vogelpohl himself possessed a knife. (Tr. 948-52.)

Vogelpohl never told Schreiber or Wilkinson that he saw petitioner stab Officer Jackson. Petitioner's attorney never asked Vogelpohl to explain this fact at trial. Petitioner's attorney never asked Vogelpohl to explain the inconsistency between his statements to Schreiber and Wilkinson and his trial testimony. Respondent attributes this inaction by petitioner's attorney to trial strategy. Petitioner' s attorney has testified, however, that he should have brought out the inconsistencies and he failed to do so, and that this failure to bring out the inconsistencies was not a matter of trial strategy. (Resp. Exh. F at 77-78). Since it was not trial strategy to fail to cross-examine Vogelpohl regarding his prior inconsistent statements, the issue before this Court is whether a competent attorney in petitioner's counsel's position would have done so. It seems to the undersigned that a competent attorney, faced with only two eyewitnesses identifying his client as a murderer, would do everything possible to attack the credibility of one of those witnesses. Vogelpohl's story acquired remarkable detail and clarity over time. Petitioner's attorney could have, and should have, pointed this out. The more difficult question, however, is whether petitioner was prejudiced by counsel's error. See Strickland, 466 U.S. at 694. Petitioner was, after all, identified by another eyewitness, inmate Edward Rugg, as one of the persons who stabbed Jackson. (See Rugg testimony, Tr. at 1042-43.) On the other hand, Rugg's "eyewitness" testimony is also highly questionable. Rugg told other inmates that he did not see Driscoll stab Jackson. (See Lassen testimony, Tr. at 1593, 1595-96, 1598-99, 1606, and Hobbs testimony at 1667.) In light of the fact

that Vogelpohl and Rugg were barely credible witnesses, further evidence of Vogelpohl's incredibility may have tipped the scales. The prejudice to petitioner by counsel's failure to address Vogelpohl's prior inconsistent statements is therefore apparent. Petitioner is accordingly entitled to a new trial due to his counsel's ineffectiveness as that claim is raised at I(k).

In claim 1(l) petitioner asserts that his counsel was ineffective because he failed to raise 26 different grounds for relief in petitioner's motion for a new trial.[17] These 26 grounds represented paragraphs 8(a)(1), (2), (3), (4), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (20), (21), and (22), and 8(b)(1), (2), (3), (4), (5), (6), and (7) in petitioner's amended Rule 27.26 motion. The bulk of these grounds were addressed by the Missouri state courts, despite their not having been included in petitioner's motion for a new trial. Petitioner therefore cannot argue that it was ineffective of counsel to fail to present Rule 27.26 grounds 8(a)(1), (2), (3), (4), (8), (9), (16), (17), (18), (19), and (20), and 8(b)(1), (2), and (3) in the motion for a new trial because the Missouri courts reached the merits of each of these claims. Petitioner therefore cannot show Strickland prejudice with respect to counsel's failure to raise these claims in the motion for a new trial.

The remaining grounds (8(a)(10), (11), (12), (13), (14), (15), (21) and (22), and 8(b)(4), (5), (6), and (7)) were never presented in petitioner's motion for a new trial and have never been reached by the state courts. Petitioner thus asserts that he has been prejudiced by his counsel's failure to present these claims in a motion for a new trial. Rule 29.11(d), Mo. R. Crim. P., provides that every allegation of error to be preserved for appellate review must

[17]See fn. 3, supra.

be included in the motion for a new trial. (Emphasis added.) Failure to raise an issue in a motion for a new trial renders that issue procedurally barred, despite a petitioner's later efforts to raise that issue collaterally via Rule 29.15 or Rule 27.26. See Prewitt v. Goeke, 978 F.2d 1073, 1077 (8th Cir. 1992). Petitioner thus is procedurally barred from raising Rule 27.26 claims 8(a)(10), (11), (12), (13), (14), (15), (21), and (22), and 8(b)(4), (5), (6), and (7), as well as the ineffective assistance corollaries to those claims, in this petition.

Because petitioner is procedurally barred f rom raising his claim that counsel was ineffective as he failed to raise all these claims in a motion for a new trial, the undersigned may not engage in a Strickland cause and prejudice analysis on the merits until the procedural bar cause and prejudice analysis is resolved. However, because ineffective assistance of counsel of constitutional dimensions can establish "cause" for a procedural default, see Murray, 477 U.S. at 486-88, the undersigned must look to the merits of the claim in order to determine whether the claim is procedurally barred.

In claim 8(a)(10) of petitioner's amended Rule 27.26 motion he argued that counsel was ineffective because he never objected to an unresponsive answer from state's witness Jimmy Jenkins to the effect that Jenkins knew petitioner wanted to kill him. Petitioner's attorney was entitled to allow that remark by Jenkins to pass without drawing further attention to it by objecting. (See Resp. Exh. F, Rule 27.26 Hearing Tr. at p. 68.) The decision to allow Jenkins' remark to pass should be treated as a trial strategy, and, as such, it is not reviewable in this proceeding. See Blackmon, 825 F.2d at 1265. Accordingly, it was not ineffective for counsel to fail to raise this issue in petitioner's motion for a new trial.

In claim 8(a)(11) of petitioner's amended Rule 27.26 motion he argued that his counsel, Robinson, was ineffective because he called petitioner a "killer" in front of the jury. Robinson's comment must be read in context. Robinson was engaged in a heated cross-examination of Jimmy Jenkins, the state's primary witness against petitioner, when Jenkins responded:

A I know what kind of individual he is.

Q Okay. I mean, he's a killer like you, is that right?

A I'm not a killer, sir.

Q Oh, I thought you were -- I thought you had a manslaughter charge on you for sticking somebody with a knife?

A Can't a guy defend himself?

Q Okay. Do you know if Mr. -- do you know if Mr. Driscoll's ever been charged with -- ever been convicted of murder?

A I don't know.

Q Just answer my question.

A I don't know.

Q You don't know if he's been convicted of murder?

A I don't know.

Q Okay. So right now, all we know is that you've been convicted of a killing but not him -- right? So far?

A I guess.

(Tr. 1158-59.)

When Robinson's "killer" comment is read in context it is clear that he was not calling petitioner a "killer," and the comment did not represent ineffective assistance of counsel. Robinson removed any taint by clarifying that, although Jenkins may have considered petitioner a killer, it would be up to the jury to decide whether society considered petitioner a killer. It was therefore not ineffective for counsel to fail to raise this issue in his motion for a new trial.

In claim 8(a)(12) of petitioner's amended Rule 27.26 motion he argued that counsel was ineffective because he failed to move for a mistrial when the prosecutor accused him of looking at the prosecutor's notes. Defense counsel testified at the Rule 27.26 hearing that he, in fact, believed he came out on the better end of this exchange with the prosecutor. (See Resp. Exh. F at p. 69.) Counsel's decision with regard to what was, in essence, a minor trial dispute, was a matter of strategy, and, as such, is not reviewable in this proceeding. See Blackmon, 825 F.2d at 1265. Accordingly, it was not ineffective for counsel to fail to raise this issue in the motion for a new trial.

In claims 8(a)(13) and (14) of petitioner's amended Rule 27.26 motion he argued that counsel was ineffective because he failed to object to what amounted to "unsworn testimony by the prosecutor." These references apparently are to the prosecutor's cross-examination of two inmate

witnesses who testified that the government witnesses had told them they had been offered inducements to testify against petitioner. Again, counsel's failure to object must be chalked up to reasonable trial strategy, and, as such, these claims are not reviewable in this proceeding. See Blackmon, 825 F.2d at 1265. Because ineffective assistance claims 8(a)(13) and 8(a)(14) are unreviewable, it was not ineffective of counsel to raise these claims in the motion for a new trial.

In claim 8(a)(15) of petitioner's amended Rule 27.26 motion he argued that counsel failed to object to the testimony of Wayne Estelle regarding the Aryan Brotherhood after Estelle admitted that he was not an expert on the Aryan Brotherhood. Wayne Estelle was called as a rebuttal witness by the prosecution after several of petitioner's witnesses claimed not to be members of the Aryan Brotherhood. (Trial Transcript at 1834-35). Estelle thus would have been a proper rebuttal witness had he been able to demonstrate that the witnesses in question were lying. As it turned out, however, Estelle admitted that he was not an expert on the Aryan Brotherhood or on their system of tattoos. (Id. at 1842). Estelle's opinion on the matter was thus at least arguably inadmissible, see, e.g., Rutledge v. Baldi, 392 S.W.2d 244, 248
(Mo. 1965), but he was nevertheless permitted to provide his opinion on the Aryan Brotherhood and the Aryan Nations Church. (Id. at 1833-45).

Admissibility of evidence is a matter of state law and generally does not give rise to federal constitutional error subject to redress in a federal habeas corpus case. Harrison v.
Dahm, 880 F.2d 999, 1001 (8th Cir. 1989). Indeed, the Supreme Court has recently reiterated that "it is not the province of a federal habeas court to re-examine state court

determinations on state law questions." Estelle v. McGuire, 112 S. Ct. 475, 480 (1991). An evidentiary question is reviewable "only when the alleged error infringed upon a specific constitutional right or is so grossly or conspicuously prejudicial that it fatally infected the trial and denied petitioner fundamental fairness." Ford v. Armontrout, 916 F.2d 457, 460 (8th Cir. 1990), cert. denied, 111 S. Ct. 1594 (1991), citing Wood v. Lockhart, 809 F.2d 457, 459-60 (8th Cir. 1986). The petitioner has failed to show that the admission of the Estelle testimony was so egregious as to have infected the entire trial fatally and thereby made it fundamentally unfair. See Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir.), cert. denied, 483 U.S. 1023 (1987) (citations omitted). See also Maxwell, 502 S.W.2d 382, 395 (Mo. Ct. App. 1973) (even if it was error to admit certain evidence on rebuttal, where the error does result in actual prejudice to the defendant reversal is not warranted). Therefore, because the testimony of Estelle did not grossly or conspicuously work to petitioner's prejudice, it was not ineffective of counsel to fail to raise this issue in the motion for a new trial.

In claim 8(a)(21) of petitioner's amended Rule 27.26 motion he argued that his counsel was ineffective because he failed to object when the prosecutor informed the jury during closing argument that he had spoken to the victim's widow the night before "and she thanks you." This claim has already been addressed as claim 1(d) (ii), supra. Because it was not ineffective of counsel to fail to object to this comment, as discussed supra, it was not ineffective for counsel to fail to raise this issue in the motion for a new trial.

In claim 8(a)(22) of petitioner's amended Rule 27.26 motion he argued that counsel was ineffective because he failed to properly and timely object to the admission into

evidence of a key and a knife that had been found secreted in petitioner's body on the first day of trial, as well as the x-rays of those objects. The record reveals that counsel did, in fact, object vigorously to the admission of this evidence on relevancy and prejudice grounds. (See Trial Tr. at 381, 1104-08, 1111, 1119.) The fact that the trial court overruled the objections[18] does not detract from the effectiveness in which the objections were deployed. The undersigned finds that counsel properly and timely objected to the evidence complained of. Because counsel performed within the range of effectiveness this Court considers competent with respect to the key and knife secreting evidence, it would have been futile to raise ineffectiveness in this regard in the motion for a new trial. Counsel, accordingly, was not ineffective for failing to raise a non-meritorious claim in the motion for a new trial.

In claim 8(b)(4) of petitioner's amended Rule 27.26 motion he argued that the Court erred by failing, sua sponte, to curtail repeated instances of prosecutorial misconduct. Petitioner thus argues here that his counsel erred by failing to preserve this issue in a motion for a new trial. This issue was otherwise preserved, however, and is addressed as claim 2(e) in this Report and Recommendation. This 8(b)(4) aspect of petitioner's claim l(l) thus succeeds in part and fails in part for the reasons set forth in the analysis of claim 2(e), infra.

In claim 8(b)(5) of petitioner's amended Rule 27.26 motion he argued that the trial court erred by failing to declare a mistrial, sua sponte, when petitioner's counsel

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[18]For an analysis of the substantive fourth amendment claims overruled by the trial judge, see analysis of claims 2(b) and 5, infra.

called petitioner a "killer." As discussed previously in the analysis of petitioner's amended Rule 27.26 claim 8(a)(11), when counsel's "killer" comment is taken in context, it fails to represent a mistake of constitutional dimensions. The Court's decision not to declare a mistrial therefore cannot be second-guessed, because there was no error of constitutional dimensions necessitating a mistrial. It was, accordingly, not ineffective of counsel to fail to raise this non-meritorious claim in the motion for a new trial.

In claim 8(b)(6) of petitioner's amended Rule 27.26 motion he argued that the trial court erred by failing to declare a mistrial, sua sponte, when the prosecutor accused petitioner's counsel of reading his notes. As discussed previously in the analysis of petitioner's amended Rule 27.26 claim 8(a)(12), petitioner's counsel never moved for a mistrial as a matter of trial strategy. It was not improper for the trial court to permit this strategy. It was, furthermore, not ineffective of counsel to fail to challenge the trial court's decision to allow the trial strategy in the motion for a new trial. Finally, in claim 8(b)(7) of petitioner's amended Rule 27.26 motion he argued that the trial court erred by failing to declare a mistrial, sua sponte, after the prosecutor engaged in "unsworn testimony." As discussed previously, at the analysis of petitioner's amended Rule 27.26 claims 8(a) (13) and (14), petitioner's counsel chose not to oppose these statements as a matter of trial strategy. It was not improper for the Court to permit such a strategy. Therefore, as with claim 8(b)(6), it was not ineffective of counsel to fail to raise this non-meritorious claim in the motion for a new trial.

Accordingly, because petitioner cannot prevail on any of the claims designated 8(a)(10), (11), (12), (13), (14), (15), (21), and (22), and 8(b)(4), (5), (6), and (7) in his amended Rule 27.26 motion, he has not demonstrated, and

cannot demonstrate, that his counsel was ineffective for failing to raise these issues in the motion for a new trial. Petitioner is thus procedurally barred from raising claim l(l) in this Court because he has failed to demonstrate cause for his failure to raise these claims in his motion for a new trial. Petitioner's claim l(l) also fails on the merits because petitioner has failed to demonstrate that it was ineffective of counsel to fail to raise the aforementioned claims in the motion for a new trial.

In claim l(n) petitioner asserts that his counsel was ineffective because he failed to object to the argument by the prosecutor that a sentence other than death would result in the petitioner's committing future crimes. Petitioner argues that at the time of his trial it was the law in Missouri that, although prosecutors could properly argue in favor of severe punishments as a deterrent to others committing similar crimes, prosecutors could not argue in favor of severe punishments as a means of preventing the defendant from committing future crimes. See, e.g., State v. Raspberry, 452 S.W.2d 169 (Mo. 1970); State v. Mobley, 369 S.W.2d 576 (Mo. 1963); State v. Groves, 295 S.W.2d 169 (Mo. 1956); State v. Heinrich, 492 S.W.2d 109 (Mo. Ct. App. 1973). Some time after petitioner's trial the Missouri Supreme Court changed the law on this question. See State v. Antwine, 743 S.W.2d 51, 71 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988) (prosecution may argue during the penalty phase of a capital trial that the death penalty will prevent the defendant from committing future crimes).

The case at hand thus presents a classic Fretwell issue. Petitioner asserts that it was ineffective of counsel to fail to make an objection which, although potentially meritorious in 1984, is no longer meritorious under the governing law. See Fretwell, 113 S. Ct. at 845. Because

petitioner's argument is precluded by Antwine, petitioner cannot demonstrate Fretwell prejudice. Petitioner's claim l(n) should therefore be denied.

To summarize at this juncture, petitioner's first claim in this habeas petition is that his counsel was constitutionally ineffective. Petitioner has provided fourteen claims of ineffective assistance. While the undersigned finds that this Court is procedurally barred from reviewing claims 1(b), 1(g), (h), 1(j), and 1(m), the undersigned finds that claims 1(c), (d), (e) , and (k) are meritorious, and petitioner is entitled to a writ of habeas corpus on these issues.

Claim 2: Denial of Due Process

In claim 2(a) petitioner asserts that the trial court denied him due process because the court failed to excuse venire person Harris, sua sponte, for cause. The undersigned notes, initially, that the analysis of this due process claim differs somewhat from the analysis, supra, as to whether it was ineffective of petitioner's counsel to fail to seek to obtain Harris' removal from the jury. That issue was resolved against petitioner on the basis of counsel's strategy to keep Harris on the jury. Claim 2(a), on the other hand, raises the question of whether the outcome of that strategy was a due process violation.

In this case venire person Harris informed the court that
although a drunk driver had killed her daughter, she could nevertheless be fair and impartial in deliberating over petitioner's fate. (Trial Transcript at 691-94). No evidence was adduced at that time, or since, which demonstrates that Harris was anything but fair and impartial. Therefore, the undersigned will recommend that petitioner was not denied

due process when the Court failed to strike venire person Harris, sua sponte, from the jury. Petitioner's claim 2(a) should therefore be denied.[19]

In claim 2(b), petitioner argues that he was denied due process because the trial court improperly excluded venire members Hodge, Baker, Lewis, and Karr for cause because they replied during voir dire that under no set of facts and circumstances could they recommend a sentence of death. (Trial Transcript, Resp. Exh. A-2 at p. 485-66, 498-504, 588-89, 601-04, 623-26, 628-30, 635-36). Petitioner argues that such "death qualification" of the jury was unconstitutional, first, because it is improper to exclude jurors solely upon the basis of their beliefs regarding capital punishment and second, because "death qualified" jurors are more conviction prone.

Petitioner's argument that it was error to exclude potential jurors because of a shared belief that capital sentencing is improper under all circumstances fails in light

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[19]Respondent argues that the question of a juror's partiality is one of historical fact, see Patton v. Yount, 467 U.S. 1025, 1036 (1984). State court findings of fact are entitled to a presumption of correctness, but there must be an actual finding of fact, evidenced by a written opinion after a hearing. Id. at 1037-40; 28 U.S. C. S 2254(d) . Here, there has never been a finding that Harris was impartial, although there is a record in state court that plaintiff's counsel was not ineffective on the Harris issue. See Driscoll, 767 S.W.2d at 7-9. Respondent contends that the finding is implicit in the court's failure to make a record. It is unnecessary, in light of the above recommendation, for the court to determine whether respondent is correct.

of the United States Supreme Court decision in Wainwright v. Witt, 469 U.S. 412 (1985). In Witt, the Supreme Court held that trial judges may exclude venire members for cause if their views on capital punishment would "'prevent or substantially impair' performance of their duties as jurors in accordance with their instructions and oaths." Id. at 433 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). Cases applying the Witt standard have held it proper to exclude for cause potential jurors who state that they would not impose the death penalty under any set of facts and circumstances. See Johnson v. Kemp, 759 F.2d 1503, 1506 (11th Cir. 1984); Celestine v. Blackburn, 750 F.2d 353, 362 (5th Cir. 1984), cert. denied, 472 U.S. 1022 (1985); Green v. Zant, 738 F.2d 1529, 1534 (11th Cir.), cert. denied, 469 U.S. 1098 (1984).

The Witt Court also addressed the appropriate standard that reviewing courts should use in considering the exclusion of jurors in capital cases, holding that a trial judge's finding of juror bias on voir dire on the issue of capital punishment is a finding of fact and is thus subject to a presumption of correctness under the federal habeas statutes, 28 U.S.C. §2254(d) (1983). Id. at 854-55. Thus, under the Witt standard, petitioner in the instant case is not entitled to habeas review because the trial judge's finding, that the views on capital punishment held by venire members Hodge, Baker, Lewis, and Karr would "prevent or substantially impair" their ability to follow their instructions and oaths regarding sentencing, is entitled to a presumption of correctness, and petitioner has provided no evidence to rebut the presumption.

Petitioner's second argument with respect to death qualification is that "death qualified" juries are more conviction prone. The Supreme Court has held that the practice of "death qualifying" a jury is permissible under

the Constitution. See Lockhart v. McCree, 476 U.S. 162, 173 (1986). The Court noted that although the exclusion of potential jurors solely on the basis of their race or gender would be a constitutional violation, the exclusion of a group of potential jurors based on a "shared attitude" would not present a constitutional problem. Id. at 174-75. Petitioner in this case presents the same arguments that McCree presented to the Supreme Court in 1986. In McCree the Court was willing to assume that "death qualified" juries are in fact more "conviction-prone," but the Court held that McCree's right to a fair trial was not compromised because his jury was nonetheless fair and unbiased. Id. at 173 and 177-84. In the case at hand petitioner has offered no evidence that his jury was anything but fair and impartial. His generic claim that all death-qualified juries are somehow unfair has been foreclosed by McCree. Petitioner's claim 2(b) should therefore be denied. See also McDowell v. Leapley, 984 F.2d 232, 234 (8th Cir. 1993).

In claim 2(d) petitioner alleges that he was denied due process when his trial court admitted into evidence a key and a knife discovered inside of petitioner's body on the first day of his trial as well as x-rays of that key and knife. The Court admitted such evidence on the theory that the evidence was relevant to demonstrate petitioner's plan to escape and this, in turn, was probative of petitioner's consciousness of guilt. See Driscoll, 711 S.W.2d at 516-17. As discussed previously, admissibility of evidence is a matter of state law and generally does not give rise to federal constitutional error subject to redress in a federal habeas corpus case. Harrison v. Dahm, 880 F.2d 999, 1001 (8th Cir. 1989). The petitioner in this case has failed to show that the admission of a key, a knife, and x-rays into evidence was so egregious as to have infected the entire trial fatally and thereby rendered it fundamentally unfair.

See Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir.), cert. denied, 483 U.S. 1023 (1987) (citations omitted) . Petitioner's claim 2(d) should therefore be denied. See also United States v. Hankins, 931 F.2d 1256, 1261 (8th Cir.) (evidence of escape from custody probative of consciousness of guilt), cert. denied, 112 S. Ct. 243 (1991); United States v. Castro, 813 F.2d 571, 577-78 (2d Cir.) (attempted escape admissible to show consciousness of guilt), cert. denied, 484 U.S. 844 (1987).

In claim 2(e) petitioner alleges that he was denied dueprocess because his trial court failed, sua sponte, to curtail repeated instances of prosecutorial misconduct at trial. These "repeated instances" are addressed at claim l(d), supra. As discussed previously, the bulk of the prosecutor's alleged indiscretions do not warrant habeas relief. The prosecutor's repeated efforts to minimize the jury's sense of responsibility did violate the Constitution, however. Therefore, just as counsel's failure to object to the prosecutor's comments was ineffective assistance, the court's failure to admonish the prosecutor rendered petitioner's trial fundamentally unfair and petitioner's due process rights were violated. Petitioner is therefore entitled to habeas relief on this aspect of claim 2(e).

In claim 2(f) petitioner alleges that he was denied due process because his trial court failed, sua sponte, to instruct the
jury on the lesser included offense of second degree felony murder. In claim 1(e), supra, the undersigned recommended that petitioner's petition for a writ of habeas corpus be granted because it was ineffective of counsel to fail to request a jury instruction for second degree felony murder. Although the undersigned will similarly recommend that it was a due process violation for the trial court to fail, sua sponte, to instruct the jury on second

degree felony murder, the analysis is slightly different from that presented in claim 1(e).

Beck v. Alabama, discussed supra, did not create a rule of law that trial judges must always give a lesser offense jury instruction sua sponte when the evidence would support such an instruction. Carriger v. Lewis, 971 F.2d 329, 335 (9th Cir. 1992), cert. denied, 61 U.S.L.W. 3651 (1993). But see Vickers, 798 F.2d at 374 (Judge Reinhardt, concurring). The undersigned will recommend that in this case, however, that because the evidence could be viewed clearly to support a second degree felony murder result, the trial judge violated petitioner's due process rights by failing to instruct the jury sua sponte on second degree felony murder, despite not having been asked to read such an instruction. Petitioner therefore is entitled to habeas relief on claim 2(f).

In claim 2 (h) petitioner alleges that he was denied due
process because the trial court required him to be shackled during trial. The Supreme Court has characterized the use of shackles as "inherently prejudicial." Holbrook v. Flynn, 475 U.S. 560, 568 (1986), "Consequently, shackling is subject to close judicial scrutiny in order to ascertain whether it was necessary for the furtherance of an essential state interest." Gilmore v. Armontrout, 861 F.2d 1061, 1071 (8th Cir. 1988), cert. denied, 490 U.S. 1114 (1989). Petitioner was required to remain shackled for the duration of the trial because the court "was interested in keeping order in the courtroom and in [maintaining] the safety of jurors and witnesses." (Trial Transcript at 374). The court was aware that petitioner had swallowed a handcuff key and had secreted a knife up his rectum on the eve of trial. (Id. at 376). Accordingly, the shackling of petitioner was necessary to further an essential state interest, courtroom

safety. Furthermore, "federal courts have repeatedly recognized that a trial court's decision concerning courtroom security is accorded broad discretion and will not be reversed absent a showing of abuse." Gilmore, 861 F.2d at 1071 (citations omitted). The undersigned accordingly will recommend that petitioner's petition, with respect to claim 2(h), be denied.

In claim 2(i) petitioner alleges that his due process rights were violated when the trial court permitted the testimony of James Simmerman as rebuttal evidence. Mr. Simmerman, a former homicide investigator, was allowed to testify (over strenuous objections from counsel) that if two people were stabbed with the same knife within five minutes of one another, only the blood of the second victim would be found on the weapon. (Trial Transcript at 1852-67). The prosecution asserted that Simmerman's testimony was permissible because petitioner had cross-examined Dr. Kwei Lee Su regarding the presence of only type A blood on State's Exhibit No. 24, and Dr. Su had replied that she could only say with any degree of scientific certainty that only type A blood was on the knife. (Id. at 1856). The prosecution thus offered Simmerman to rebut its own witness.[20]

The defendant in a criminal case has no obligation to put on a defense. If the defendant chooses to do so he runs the risk that the prosecution will offer further evidence to rebut the defendant's evidence. Our system of jurisprudence does not contemplate that, just because the

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[20]In the State's response it asserts that it called Mr. Simmerman "to clarify the testimony of Dr. Kwei Lee Su." (Response at p. 80). The state has never contended that it offered Simmerman's testimony to rebut any of petitioner's witnesses or exhibits.

defendant chooses to offer a defense, the prosecution may be given the opportunity to start over and attempt to rehabilitate weaknesses in its own case that were brought out during its own case. Typically, of course, rebuttal witnesses are not disclosed in advance. They come out of the blue to attack defendants' cases. They are, accordingly, by definition, prejudicial to the defense. The issue before this Court is whether Simmerman's testimony was unfairly prejudicial.

The rule in Missouri is that "[any] competent testimony that tends to explain, counteract, repel or disprove evidence offered by defendant may be offered in rebuttal of the defendant's testimony or evidence." State v. Dizdar, 622 S.W.2d 300, 301 (Mo. Ct. App. 1981) (emphasis added) quoting State v. Williams, 442 S.W.2d 61 (Mo. banc 1968), overruled on other grounds in State v. Ayers, 470 S.W.2d 534, 538 (Mo. banc 1971). In Dizdar the state offered evidence on rebuttal which directly contradicted the assertions of the defendant. The evidence was, accordingly, proper rebuttal. See id. at 301-302. Respondent additionally cites State v. Crain, 638 S.W.2d 761 (Mo. Ct. App. 1982) and State v. Pospeshil, 674 S.W.2d 628 (Mo. Ct. App. 1984) in support of its position that it could present Simmerman's testimony. In each of these cases, however, the state offered evidence which conformed with the rule that the state can only rebut the defendant's case, not its own.

Respondent's strongest argument is that "rebuttal testimony is not necessarily inadmissible merely because it is cumulative of the state's evidence in chief or because it would have been better procedure for it to have been offered as part of the state's evidence in chief rather than in rebuttal." Crain, 638 S.W.2d at 762. Were Simmerman's testimony merely cumulative, respondent would prevail on

this claim. Simmer-man's testimony was not merely cumulative, however. Without Simmerman's testimony, petitioner's attorney could have argued that the state presented not a whit of evidence that there was type 0 (Jackson's) blood on state Exhibit No. 24 (allegedly petitioner's knife). Petitioner's attorney could have focused on Dr. Su's testimony that one could only speculate whether that knife had been exposed to type 0 blood; certainly, the state had not proved beyond a reasonable doubt that the knife had been exposed to Jackson' s blood. The Simmerman testimony seriously damaged this argument.

The question then becomes whether the state could simply have offered Simmerman in its case in chief. Had the state endorsed Simmerman, petitioner's attorney would have been tipped off to the importance of the type A/type 0 blood interaction. He may have engaged in far more investigation than he did on this point. The entire course of the trial may have been altered. The state would have this Court believe that Simmer-man's testimony played a minor role in petitioner's conviction. The undersigned disagrees. Mr. Simmerman's testimony was the last testimony of any substance in this case. The jury heard Mr. Simmerman late in the afternoon on December 4, 1984. They then retired for the evening, came back the next morning for one-half hour of additional evidence, retired for a break, heard jury instructions, and then decided petitioner's fate. The Simmerman testimony, furthermore, did not contradict any of Driscoll's evidence, and thus violated the Missouri rule regarding rebuttal testimony.

As discussed previously, in order to warrant habeas relief an alleged evidentiary impropriety must be "so grossly or conspicuously prejudicial that it totally infected the trial and denied petitioner fundamental fairness." Ford, 916 F.2d at 460. Were petitioner's trial otherwise

fundamentally fair with respect to the blood evidence, the testimony of Simmerman would not meet this stringent test. Petitioner's trial was not otherwise fundamentally fair, however, on the crucial issue of the blood on State's Exhibit No. 24. Simmerman's testimony thus com-pounded the prejudice and rendered the trial fundamentally unfair, depriving petitioner of due process. Petitioner is entitled to relief on claim 2(i).

In claim 2(j) petitioner alleges that his due process rights were violated when the trial court failed to, sua sponte, prohibit the prosecutor from arguing in closing that any sentence other than the death sentence would result in petitioner's committing other crimes in the future. As discussed previously, some time after petitioner's trial the Missouri Supreme Court encountered this issue in State v. Antwine, 743 S.W.2d 51, 71 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988). The Antwine court upheld similar comments by the prosecutor. It is against this backdrop that the undersigned evaluates petitioner's claim that the prosecutor engaged in improper closing argument in a trial held before Antwine. The undersigned finds that the prosecutor's comments did not "so infect[] the trial court with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 642. Petitioner is therefore not entitled to relief on claim 2(j).

4th Claim: Motion to Suppress

In petitioner's fourth claim he asserts that he was denied due process because the Court failed to sustain his motion to suppress statements he made to investigators following the riot. Petitioner asserts that these statements were the product of physical and psychological coercion and intimidation and, therefore, were not the product of a knowing, voluntary, and intelligent waiver of petitioner's

privilege against self- incrimination. Respondent argues that petitioner is procedurally barred from raising this claim because he'failed to raise the issue on direct appeal. (See Response at p. 85.) This is not entirely correct. While petitioner did not raise the issue with precision, he pleaded enough for the Missouri Supreme Court to reach the merits of the issue. See Driscoll, 711 S.W.2d at 517. This Court accordingly may reach the merits of this issue as well. See Byrd, 942 F.2d at 1230 (state courts may remove procedural bar by reaching the merits of a claim).

In order to prevail on a claim that his statements were not the product of a knowing, voluntary and intelligent waiver of his privilege against self-incrimination, petitioner must demonstrate "a substantial element of coercive police conduct." Colorado v. Connelly, 479 U.S. 157, 164 (1986). Petitioner has provided not a shred of evidence to this Court that his statement to authorities (admitted as State's Exhibit 44) was the product of coercion. Indeed, petitioner has pleaded no more than the unsubstantiated, conclusory allegation that his statement was involuntary. (See Amended Petition at ¶ 78.) Petitioner's claim should therefore be denied because petitioner has not demonstrated that he was coerced in any manner into making a statement. Moreover, the undersigned notes, having reviewed the entire transcript, that the introduction of State's Exhibit No. 44 cannot be said to have rendered petitioners trial fundamentally unfair, even when viewed in the context of the other improprieties discussed in this Report and Recommendation. See also Snethen v. Nix, 885 F.2d 456, 460, n.6 (8th Cir. 1989), cert. denied, 496 U.S. 940 (1990). This claim should therefore be denied.

5th Claim: X-Ray Search

Petitioner claims that his fourth amendment right to be free from an unreasonable search and seizure was violated when he was x-rayed on the first day of trial. The fourth amendment prohibits "unreasonable" searches. Bell v. Wolfish, 441 U.S. 520, 558 (1979) (upholding visual rectal searches of pretrial detainees following contact visits). To evaluate the reason-ableness of a particular search the Court must weigh "the need for the particular search against the invasion of personal rights that the search entails." Id. at 559. The following factors should be considered: (1) the scope of the particular intrusion; (2) the manner in which it was conducted; (3) the justification for initiating it; and (4) the place in which it was conducted. Id. The Bell Court noted that "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." Id. The undersigned finds that the fact that petitioner was x-rayed on the first day of his trial did not violate his fourth amendment rights. Petitioner was facing a possible death sentence and the risk of his escape was considerable. Prison officials furthermore had evidence that petitioner had swallowed something. (See Trial Transcript at 1103). An x-ray was a relatively unintrusive means of ascertaining whether he had swallowed or secreted contraband which could be used to facilitate such an escape. Petitioner is therefore not entitled to habeas relief on this claim.

Alternatively, the undersigned notes that Stone v. Powell, 428 U.S. 465, 486 (1976), requires only that a habeas petitioner must have been provided with a full and fair opportunity to litigate his fourth amendment concerns in state court in order for the State to withstand a fourth amendment habeas claim. Here petitioner has not alleged that he was not provided a full and fair opportunity to contest the x-rays in state court. Indeed, his counsel

vigorously opposed the introduction of the x-rays into evidence. (See Trial Transcript at 1104-08). Therefore, because petitioner had a full and fair opportunity to raise his fourth amendment claim with respect to the x-rays, petitioner should be denied relief on his fifth claim. See also Brunson v. Higgins, 708 F.2d 1353, 1360 (8th Cir. 1983).

Claim 6(a): Proportionality-Review

Petitioner alleges that his sentence of death is excessive and disproportionate when compared to similar cases. The State of Missouri requires its Supreme Court to conduct a "pro-portionality review" pursuant to § 565.014.3(3) whenever it reviews death sentences. The Court did so in Driscoll's case and concluded that the penalty imposed on petitioner was neither excessive nor disproportionate to the penalties imposed in similar cases. Driscoll, 711 S.W.2d at 517.

The United States Supreme Court considered the necessity of proportionality review in Pulley v. Harris, 465 U.S. 37, 50-51 (1984). The Court held that, where a jury considered both aggravating and mitigating circumstances (in a case such as petitioner's), proportionality review is but yet another constitutional safeguard. It is helpful, but not constitutionally required. See also Collins v. Lockhart, 754 F.2d 258, 261 (8th Cir.), cert. denied, 474 U.S. 1013 (1985). Petitioner's claim 6(a) should therefore be denied because a proportionality review is not mandated by the Constitution.[21]

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[21]Should petitioner argue that § 565.014.3.(3) gave him a liberty interest in a meaningful proportionality review despite the fact that it was not constitutionally required, there is no evidence to suggest that the proportionality

Claim 6(b): Sufficiency of Evidence Regarding Aggravating Circumstances

Petitioner alleges that his death sentence is unconstitutional when one considers the "substantial evidence of mitigating factors and a paucity of evidence tending to support the suggested aggravating factor." (See Amended Petition at ¶ 79.)

The jury found beyond a reasonable doubt that (a) petitioner had "a substantial history of serious assaultive convictions"; (b) Tom Jackson was murdered while he was engaged in the performance of his official duties as a correctional officer; and (c) at the time Tom Jackson was murdered petitioner was in the lawful custody of a place of confinement. (Resp. Exhibit B-4 at 920.) In so finding, the jury decided beyond a reasonable doubt that no mitigating circum-stance or circumstances outweighed the aggravating circum-stances. (See Resp. Exh. B-4 at 920.) The jury was therefore not obliged to recite on a jury form which mitigating factors it considered, although it clearly considered (a) whether petitioner's role in Tom Jackson's murder was relatively minor; (b) whether petitioner's capacity to appreciate the criminality of his actions or to conform his conduct to the requirements of law was substantially impaired; and (c) any other circumstances they may have found from the evidence in extenuation or mitigation of punishment. (Id.)

By permitting the jury to consider any mitigating evidence supported by the record the trial court complied with the dictates of Lockett v. Ohio, 438 U.S. 586, 604-06 (1978). Petitioner concedes as much. Petitioner argues,

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review petitioner received from the Missouri Supreme Court was anything but genuine and meaningful.

however, that the evidence of mitigating circumstances outweighed the evidence of aggravating circumstances. Unfortunately, petitioner has not explained how. Because there was substantial evidence supporting a finding of each of the aggravating circumstances, and because the jury was entitled to find that somewhat less evidence supported each of the mitigating factors, the undersigned will recommend that this claim be denied.[22]

Claim 7: Clergy

Petitioner asserts that the trial court violated his f irst, sixth, ninth, and f ourteenth amendment rights by refusing his request to allow a clergyman to testify during the penalty phase of his trial. The clergyman, a bishop of the United Methodist Church, intended to provide testimony as to his own moral position on capital punishment and to conclusions that the death penalty is imposed most often on minorities and poor persons represented by appointed counsel. (See Tr. at 384-88.)

The United States Supreme Court provided the under-lying framework for analyzing petitioner's claim in McKleskey v. Kemp, 481 U.S. 279 (1987). In McKleskey, a black man was convicted by a Georgia trial court of armed robbery and murder, the jury recommended the death penalty on the murder charge, and the trial court followed this recommendation. After exhaust-ing his state remedies,

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[22]The undersigned does not understand plaintiff's claim 6 (b) to be a challenge to the manner in which the jury was permitted to evaluate mitigating factors. Such a claim would find authority in Mills v. Maryland, 486 U.S. 367 (1988), but, as discussed at claim 2(g), supra, plaintiff's Mills claim is procedurally barred.

petitioner sought habeas corpus relief in the federal court, alleging that the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments. In support of his claim, petitioner offered expert testimony at an evidentiary hearing based upon statistics (the Baldus study) that purported to show racial discrimination in the imposition of the death penalty in Georgia.

The Supreme Court rejected petitioner's constitutional claims because petitioner's generalized statistics did not prove that the decision makers in petitioner's particular case acted with a racially discriminatory purpose. The Supreme Court con-cluded that McKleskey's claim that the statistics were sufficient proof of discrimination, without regard to the facts of a particular case, would impermissibly extend to all death penalty cases in Georgia. Id. at 292-94. The Court opined that the nature of the capital sentencing decision was a unique one which did not lend itself to a finding of a constitutional violation based upon a general statistical pattern. Id.

> [E]ach particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.

Id. at 294. Thus, the McKleskey Court concluded that it was wholly impermissible to apply general assertions and

statistics evincing discrimination to a specific decision of a trial court.

Recently, in Richmond v. Lewis, 921 F.2d 933, 949 (9th Cir. 1990), amended, 948 F.2d 1473 (9th Cir. 1991), reversed and remanded on other grounds, 113 S. Ct. 528 (1992), the Ninth Circuit applied McKleskey when facing a petition for habeas corpus relief based upon a petitioner's claim that the district court "erred in denying his request for an evidentiary hearing upon his claim that Arizona's administration of the death penalty is racially, sexually, and socioeconomically discriminatory." Id. at 949. Petitioner had sought to introduce expert testimony that:

> although 15% of the victims of homicides in Arizona since 1973 have been black, every person under death sentence was convicted of killing a white victim; that although approxi-mately 10% of the persons convicted of homicide in Arizona since 1973 have been women, no women are on death row. All three experts who had examined the Arizona death sentencing process from 1973 to the present (March 1987) found significant discrepancies based on the victim's race; on the defendant's race, and one demonstrated significant disparities based on sex and economic status as well.

Id. (quoting Brief for Appellant at 38-39).

The Ninth Circuit concluded that even if proven, the statistical disparities to which the experts would testify would be insufficient to establish purposeful discrimination in the case before them.

> To require the district judge to weigh this evi-dence would be to suggest that Richmond's death sentence could conceivably be invalidated solely on the basis of his physical or social affinity to other defendants who are not now before this court but who may have suffered unconstitu-tional discrimination in their receipt of the same sentence. This we cannot do.

Id. at 949. The Richmond court concluded that in order for petitioner Willie Richmond to prevail in challenging his sentence, he "must prove that the decision makers in his case acted with a discriminatory purpose." Id. (quoting McKleskey at 292.). The Ninth Circuit emphasized that the expert testimony Willie Richmond sought to introduce would yield precisely the sort of generalized statistical evidence that was rejected as unactionable by the Supreme Court in McKleskey.

The instant case parallels Richmond and McKleskey. Even if proven, the disparities about which the clergyman sought to testify would be insufficient to support an inference of purposeful discrimination in petitioner's own particular case. The bishop's testimony would have consisted only of his generalized assertions of discrimination based on race and socioeconomic status in the application of Missouri's death penalty statute to other defendants. The clergyman's testimony was devoid of any knowledge regarding discrimination in petitioner's specific case. Thus, the trial court did not err in refusing petitioner's request to allow the bishop to testify at the sentencing phase of his trial.

Claim 9: Unbridled Discretion

In claim 9, petitioner claims that the Missouri death penalty statutes are inherently unconstitutional because the statutes permit the prosecuting attorney to exercise unbridled discretion in deciding who will be exposed to the possible sentence of death.

The United States Supreme Court rejected petitioner's argument in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, the defendant claimed that the Georgia death penalty statutes provided the prosecutor with "unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them." Id. at 199. The Gregg court held that the prosecutor's discretion in charging capital murder in a particular case under Georgia's death penalty statutes did not render the statutes unconstitutional. The Supreme Court emphasized that the Georgia statutes only afforded the prosecutor discretion to remove a defendant from consideration as a candidate for the death penalty. This is in sharp contrast to a situation where the prosecutor has unfettered discretion to impose the death sentence on a specif ic individual who has been convicted of a capital offense. The former statutory framework is constitutional, whereas the latter legislative scheme would not be constitutional. Id. Moreover, the Supreme Court recognized that to limit the prosecutor's discretion in removing defendants from consideration as candidates for the death penalty "would be unconstitutional . . . [creating] a system that in many respects would have the vices of a mandatory death penalty statute." Id. at 200 n.50.

The Missouri Supreme Court, relying on Gregg, has rejected constitutional challenges to the prosecutorial discretion exercised under the Missouri death penalty statutes. State v. Smith, 781 S.W.2d 761 (Mo. banc 1989),

vacated, 495 U.S. 916 (1990), adhered to on remand, 790 S.W.2d 241 (Mo. banc 1990), cert. denied, 111 S. Ct. 443 and 111 S. Ct. 2043 (1990 and 1991); State v. Trimble, 638 S.W.2d 726, 736 (Mo. banc 1982), cert. denied, 459 U.S. 1188 (1983). In light of Gregg, Smith, and Trimble, petitioner's claim that the Missouri death penalty statutes unconstitutionally afford the prosecutor unbridled discretion must fail.

Accordingly,

IT IS HEREBY RECORDED that the petition of Robert Driscoll, a/k/a Albert Eugene Johnson, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be granted.

The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained from the District Judge, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. See Thompson v. Nix, 897 F-2d 356 (8th Cir. 1990).

Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES
MAGISTRATE JUDGE

Dated this 18th day of January, 1994.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT DRISCOLL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 89-1894C(6)
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

MEMORANDUM

This matter is before the Court on the petition of Robert Driscoll, a/k/a Albert Eugene Johnson for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Pursuant to 28 U.S.C § 636(b), the Court referred all pretrial matters in this action to United States Maaistrate Judge Catherine D. Perry. On January 18, 1994, Magistrate Judge Perry filed her Report and Recommendation recommending that the petition be granted. Respondent filed forty-three pages of objections to the Report and Recommendation on March 10.[1] Counsel for petitioner filed

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[1]The Court notes that on pages two and three, respondent begins his list of objections with the assertion that the Magistrate Judge erred in her reliance on Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993) because "that opinion has been vacated by the appellate court." Respondent asserts that the opinion was vacated on February 22, 1994. Respondent is incorrect in his assertion. The opinion in Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993) has not been

four pages of objections to the Report and Recommendation which consisted of twenty-one conclusory assertions of error and lacked any legal authority. Despite several requests for an extension of time in which to file a response to respondent's objections, counsel for petitioner has failed to file the response. Petitioner filed pro se objections to respondent's objections to the Report and Recommendation on June 9, 1994.

After de novo review of the record, including all objections to the Report and Recommendation, the Court finds the well-reasoned opinion of the Magistrate Judge to be proper in all respects. Accordingly, the Court will grant the petition of Robert Driscoll, a/k/a Albert Eugene Johnson, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Dated this 8th day of July, 1994.

George F. Gunn, Jr.

GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

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vacated.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs .	)	No. 66852
	)	
ROBERT DRISCOLL, a/k/a/ ALBERT EUGENE JOHNSON,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT
OF PHELPS COUNTY
Division No. 1
Honorable Douglas E. Long, Jr., Judge

Defendant Robert Driscoll[1] was convicted by a jury of capital murder, § 565.001, RSMo 1978 (repealed effective October 1, 1984), for the stabbing death of Thomas Jackson, a correctional officer assigned to the Missouri Training Center for Men in Moberly, Missouri. We have exclusive appellate jurisdiction of this criminal

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[1] Defendant's true and legal name is Albert Eugene Johnson, however, evidence at trial revealed that defendant assumed the alias, Robert Driscoll, after he robbed a person of that name in 1982 in California. Defendant stole the robbery victim's identification material.

case because defendant has been sentenced to death. See Mo. Const. art. V , § 3.

In fixing death as the appropriate punishment, the jury found basis for the imposition of capital punishment the following statutory aggravating circumstances: (1) defendant had a substantial history of prior assaultive criminal convictions [§ 565.012.2(l)] (repealed effective October, 1984); (2) the victim was a corrections employee engaged in the performance of his official duty [§ 565-012. 2(8)]; and, (3) the defendant was in the lawful custody of a place of confinement [§ 565-012.2(9)]. In connection with defendant's criminal history, the State introduced evidence documenting that defendant had seven prior felony convictions and an established reputation for violence.

Along with defendant Driscoll, two other Moberly inmates, Rodney Carr and Roy Roberts, were charged and separately convicted of capital murder in connection with the stabbing death of Officer Jackson. This Court recently affirmed the capital murder conviction of Roy Roberts for his role in the murder of Officer Jackson. See State v. Roberts, ___ S. W. 2d ___ (Mo. banc 1986) (No. 66933, handed down May 7, 1986). The fundamental facts and circumstances surrounding the murder of Officer Jackson are set forth in detail in Roberts. We direct the reader to Roberts for a complete explication of the factual history of Officer Jackson's death. The additional facts we set forth are those which are uniquely relevant to the circumstances of defendant's role in the murder of Officer Jackson -- which occurred during a brief melee involving prisoners and correctional officers in the B Wing at the Moberly facility on July 3, 1983.

After Officer Jackson had been physically overcome and pinned against a partition by Roy Roberts, a 300 pound

inmate, defendant, using a homemade knife that he had already assembled and had concealed in the back of his pants, thrust the instrument of death three times into Officer Jackson's chest. Two of defendant's fatal thrusts penetrated the victim's heart and lungs. As defendant, Roberts, and Carr were murdering Officer Jackson, the victim's coworkers desperately tried to bring Officer Jackson to safety, but other inmates stalled the rescuing guards' efforts. In the course of the efforts of fellow guards to rescue Officer Jackson, defendant managed to stab Officer Harold Maupin in the shoulder.

While the disturbance continued and additional guards sought to restrain the prisoners and restore order, defendant returned to his cell and changed his clothes, which by that time had become stained with the blood of his victims.[2] As order was being reestablished and inmates began to flee to their cells, defendant told his cell mate, Jimmy Jenkins, "I killed the freak." And he also sought further recognition for his actions from another inmate, Joe Vogelpohl, by inquiring of Vogelpohl. "[did I take him out JoJo or did I take him out?" Furthermore, the following day defendant made an inculpatory statement to Highway Patrol and prison investigators. The wounds that were inflicted upon the victim by defendant were determined to have caused Officer Jackson's death.

At the outset, we initially note defendant does not question the sufficiency of the evidence to sustain his conviction.

Defendant's first two assignments of trial error concern allegedly improper and prejudicial statements made

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[2] Defendant's pants were found to contain blood that matched the blood type of Officer Jackson.

by the prosecutor to the jury throughout the trial. First, defendant contends that the prosecutor improperly conveyed to the jury the notion that it is the trial judge and not the jury who bears the ultimate responsibility for the final imposition of sentence.[3] Second, defendant, maintains that certain remarks by the prosecutor served to dilute defendant's right to be presumed innocent and actually caused the burden of proof to shift to the defendant.[4]

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[3] The following excerpted commentary by the prosecutor is illustrative of the statements which defendant maintains lessened the gravity of the jury's responsibility to impose sentence upon defendant.

> But when you've returned a verdict of--say a recommendation of death, you each one have an individual vote. But also, the Judge has a vote. Do you understand that? In other words, it takes thirteen.
>
> So what you as a jury do is on the punishment stage, you go back and you agree as a group--and assume for a moment that you made a recommendation of death. Now, what that means is that the judge can now consider a sentence of death as one of the two possible sentencing alternatives. Do you understand that?
>
> What I'm saying is that the final decision is up to the Judge.

These statements were made during **voir dire**; however, defendant has also targeted similar statements made during the prosecution's opening statements in the penalty phase of the trial.

[4] The statements of the prosecutor that defendant contends undermined the presumption of

Before proceeding to an examination of defendant's first two points it should be observed that defendant seeks review of them under the plain error doctrine because of his failure to object or preserve the points in his motion for new trial. Under this standard of review, the plain error complained of must impact so substantially upon the rights of the defendant that manifest injustice or a miscarriage of justice will result if left uncorrected. See State v. Miller, 604 S.W.2d 701 (Mo.App. 1980).

We turn now to defendant's first contention which focuses on the trial court's failure to sua sponte admonish the prosecutor for making statements to the jury throughout the trial which suggested that the judge and not the jury was responsible for the final imposition of sentence.

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innocence and shifted the burden of proof took the following form during an exchange between the prosecutor and a venireperson during **voir dire**.

> [Prosecutor]: Now, the reason why I'm asking you this, Mr. Christopher, is that the innocent people--the people of the State of Missouri are entitled to a fair trial here too. It's not only the Defendant that's entitled to a fair trial--the people are entitled to a fair trial too. Do you understand that?
>
> VENIREMAN CHRISTOPHER: Now, what are you talking about--people?
>
> [Prosecutor]: Well, I'm talking about the innocent people--the people--the taxpayers and the people who have a right to be safe in their home. Do you understand? [Emphasis added.]

Defendant has also challenged similar remarks made during the State's closing argument in the guilt phase of the trial.

In State v. Roberts, supra, we were confronted with a similar assignment of error involving prosecutorial comments that were made during the punishment phase of the trial. The defendant in Roberts argued that it was plain error for the trial court not to have declared a mistrial admonish the jury when the prosecutor informed the jury that their verdict would serve only as a recommendation to the trial judge.

In rejecting this argument we began by pointing out that in Missouri, Rule 29.05 vests in the trial court the "power to reduce . . . punishment . . . for the offense if [the court] finds the punishment excessive." Consequently, we concluded that the prosecutor's statement that the trial judge could reduce the correct statement of law. Roberts, Slip op. at 23. Additionally, we noted that the defendant in Roberts had failed to enter an objection when the prosecutorial comments were made. Roberts, Slip op. at 24. Furthermore, we found that Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633 (1985), under the facts of Roberts, did not compel a finding of plain error because Caldwell involved a clearly inaccurate statement of law -- which was not the case in Roberts. In the same respect, Caldwell is distinguishable from the facts of the present case.

Here, defendant does not contend that the prosecutor made an incorrect statement of law but only that his remarks undermined the gravity of the jury's decision. As noted, supra, the defendant failed to object to the prosecutorial comments which he now assigns prejudice. Next, the transcript reveals that defendant himself, reiterated the prosecutor's comments to the panel during voir dire -- in an apparent attempt to impress upon them that it was the jury, rather than the trial judge, who carries the primary responsibility for imposing sentence. This was done by defendant on two separate occasions.

Contrary to defendant's contentions the record in this case fails to reveal plain error of any degree which if left uncorrected would result in either manifest injustice or a miscarriage of justice. As we have already noted, defendant in the first instance failed to offer an objection of any kind. Second, defendant, for what appears to be tactical reasons, voluntarily repeated to the jury panel the very prosecutorial comments he now maintains are improper and prejudicial. See e.g., State v. Foster, 700 S.W.2d 410, 443 (Mo. banc 1985). Third, the transcript demonstrates that throughout voir dire, defendant, as well as the State, attempted to convey to the veniremen and venirewomen the seriousness of the responsibility thrust upon a jury in a capital murder case. Finally, our conclusion that the trial court's failure to sua sponte admonish the prosecutor does not constitute plain error is not altered by defendant's invocation of the teachings of Caldwell.

Defendant next contends that the prosecutor's repeated references to the "innocent people of Missouri", which were made during voir dire and closing arguments of the guilt phase of the trial, served to ridicule and undermine the operation of the presumption of innocence and shifted the burden of proof -- thereby denying defendant a fair trial. Specifically, defendant assigns plain error to the trial court's failure to admonish the prosecutor and instruct the jury each time the prosecutor made these references.

Initially, it should be pointed out that of the times the prosecutor engaged in this line of argument defendant made but only a single objection -- which the trial court acted upon by cautioning the prosecutor. However, we find it curious why defendant failed to object again for the remainder of the trial. If defendant's failure to act was

rooted in trial strategy he should not now be heard to complain about the consequences of his own inactions. Furthermore, we find it difficult to dismiss entirely the possibility that the trial judge might have assigned strategic reasons to defendant' s prolonged silence in this matter. In this connection, it must be noted that defendant's silence carried over into his motion for a new trial, which did not denominate as error of any kind the trial judge's failure to **sua sponte** admonish the prosecutor for engaging in this line of commentary.

Equally important in our review of this issue is the fact that throughout the course of the trial, both advocates repeatedly and forcefully impressed upon the jury the concept that in a criminal case there existed a presumption of innocence and that it was very much in operation in the present case and that the State did have the burden of proving defendant's guilt beyond a reasonable doubt.

After having carefully reviewed the transcript and after examining defendant's arguments, we conclude the trial court's failure to **sua sponte** admonish the prosecutor and instruct the jury panel did not constitute plain error.

On the day defendant's trial was scheduled to commence, defendant was subjected to an x-ray for security purposes connected with transporting him to trial and securing his presence at trial. The x-ray revealed a homemade handcuff key in his stomach and a knife wrapped in gauze concealed in his rectum, At trial the State introduced these items into evidence and defendant objected on the basis they were irrelevant and unduly prejudicial. The trial court overruled defendant's objection and admitted the items into evidence.

Initially, it should be observed that with respect to the question of relevancy, "the trial court has broad discretion and its decision should be overturned only if it abused that discretion." State v. Blair, 638 S.W.2d 739, 757 (Mo. banc 1982), cert. denied Blair v. Missouri, 459 U.S. 1188 (1982) reh'g. denied, 459 U.S. 1229 (1983). Additionally, it should be noted that "evidence is relevant if it logically tends to prove or disprove a fact in issue or to corroborate evidence which itself is relevant and bears on the principal issue." State v. Berry, 679 S.W.2d 868, 875 (Mo.App. 1984).

In the present case the handcuff key and knife were evidentiary items that helped establish a plan to escape, which in turn was relevant in showing a consciousness of guilt. Defendant, however, was free to -- and in fact did -- attempt to discredit the effect of this evidence in argument to the jury. We find no abuse of discretion and no reversible error.

Next, defendant argues that an inculpatory statement he gave to investigating officers the day after Officer Jackson's murder should have been suppressed because the statement was a product of physical and psychological coercion. The trial court denied defendant's motion to suppress admission of this statement. The transcript reveals substantial evidence from which the trial court could have concluded that defendant's inculpatory statement was given and received within the bounds of our state and federal Constitutions.

Defendant's next contention focuses on the trial court's excusing for cause four venirepersons who testified that they would be unable to consider a sentence of death under any circumstances. This issue was recently decided by the United States Supreme Court in Lockhart v. McCree,

54 U.S.L.W. 4449 and under Lockhart, defendant's claim of constitutional deprivation is without merit. See State v. Zeitvogel, 707 S.W.2d 365 (Mo. banc 1986).

Defendant also challenges the constitutionality of the death penalty -- under both the Missouri and United States Constitutions. This Court has repeatedly rejected constitutional challenges to Missouri's death penalty provisions. See e.g. State v. Gilmore, 681 S.W.2d 934, 946 (Mo. banc 1984); State v. Byrd, 676 S.W.2d 494, 506-07 (Mo. banc 1984) cert. denied, Byrd v. Missouri, 105 S.Ct. 1233 (1985); State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982) cert. denied, 495 U.S. 884, reh'g. denied, 459 U.S. 1024 (1982). The point is denied.

Finally, we are required by statute, § 565.014, RSMO 1978 (repealed effective October 1, 1984; current statute, § 565.035, RSMO Cum. Supp. 1984), to conduct an independent review of all death sentences. Defendant does not argue that his sentence was a result of "passion, prejudice, or any other arbitrary factor", and the entire legal record and transcript support without reservation the conclusion that defendant's sentence was not a result of any one of these three circumstances. Section 565.014.3(l). Furthermore, the three statutory aggravating circumstances which were found by the jury are amply supported by the evidence presented at trial.

The last component of our independent review requires us to consider whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Section 565.014.3(3). In conducting our review, we examined the following cases. See e.g., State v. Roberts, supra; State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982); State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982),

cert. denied, 459 U.S. 928 (1983); State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), cert. denied, 459 U.S. 1188 (1983); State v. Guinan, 665 S.W.2d 325 (Mo. banc 1984), cert. denied, 105 S.Ct. 227 (1984); State v. Zeitvogel, supra.

In this case the victim was repeatedly stabbed by defendant, while unarmed and physically incapacitated. The evidence is virtually undisputed as to defendant's guilt and the offensive nature of the sixty-two year old guard's death. Defendant had a substantial history of criminal conduct that was not deterred by incarceration. As we observed in State v. Roberts, supra, there must be a real cost attached to taking the life of an unarmed prison guard. Absent such a cost, order and stability will forever remain an illusive goal in our penal system.

We conclude that the penalty imposed is neither excessive nor disproportionate to the penalties imposed in similar cases, considering the facts and circumstances of the crime and the defendant.

We have examined defendant's remaining points and find them to be without merit.

Judgment affirmed.

WILLIAM H. BILLINGS, Judge

Higgins, C.J., Donnelly, Rendlen, JJ.
and Gaertner, Sp.J., concur; Blackmar, J.,
concurs in result in separate opinion filed;
Welliver, J., concurs in result in separate
concurring in result opinion of Blackmar, J.,
Robertson, J., not sitting.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	No. 66852
	)	
ROBERT DRISCOLL, a/k/a/ ALBERT EUGENE JOHNSON,	)	
	)	
Appellant.	)	

OPINION CONCURRING IN RESULT

I deplore the prosecutor's attempt to downplay the importance of the jury's function in death sentence cases, for the reasons set forth in my concurring opinion in **State v. Roberts**, ___ S.W.2d ___ (Mo. banc 1986) (No. 66933, decided May 7, 1986). I do not accept the principal opinion's attempt to distinguish Caldwell by the suggestion that the statements in the present record are not "clearly inaccurate." It is inaccurate to refer to the jury's verdict of death as a "recommendation," or to refer to the trial judge as a "thirteenth juror." I concur in the result, however, because of the gravity of the offense, the absence of objection, and statements by defense counsel indicating absence of disagreement with the prosecutor's legal proposition.

The principal opinion does not repeat the admonition of Roberts that prosecutors not use this kind of argument in the future, but I assume that the Court's position on the matter is unchanged. I am also gratified by the Attorney General's assurance that there will be no repetition in cases where that office is responsible for the trial. We should not tolerate future attempts to minimize the gravity and importance of the jury's duty in capital cases.

CHARLES B. BLACKMAR, Judge

SUPREME COURT OF MISSOURI
EN BANC

ROBERT DRISCOLL,	)	
	)	
Appellant,	)	
	)	
vs	)	No. 70717
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT
OF PHELPS COUNTY

Honorable Weldon Moore, Judge

Robert Driscoll was charged and convicted of capital murder and sentenced to death. The conviction was affirmed on direct appeal . State v. Driscoll, 711 S.W.2d 512 (Mo. banc 1986), *cert. denied*, 107 S.Ct. 329 (1986). This is an appeal of his Rule 27.26 motion for post-conviction relief from that conviction and sentence. The hearing court denied relief. We affirm.

Driscoll was convicted of the capital murder of Tom Jackson, a correctional officer at Missouri Training Center for Men. Officer Jackson was stabbed during a riot at that facility.

Driscoll contends that he received ineffective assistance of counsel in his criminal trial and its appeal. He asserts nine grounds whereby he claims the hearing court erred in holding that his trial counsel provided the effective assistance guaranteed by the Sixth and Fourteenth

Amendments.[1] Driscoll further asserts that he was denied his right to due process of law in violation of the Fourteenth Amendment because the trial court failed to control certain arguments made by the prosecutor at the criminal trial.

Our review of the actions of the hearing court is limited to a determination of whether that court's findings, conclusions and judgment are clearly erroneous. Rule 27.26(j); Sanders v. State, 738 S.W. 2d 856, 857 (Mo. banc 1987) ; Futrell v. State, 667 S.W.2d 404, 405 (Mo. banc 1984).

In reviewing the determinations of the hearing court with respect to Driscoll's claims of ineffective assistance of counsel, the focus is on (1) counsel's performance, and, (2) if that performance is deficient, whether prejudice resulted from counsel's breach of duty. Strickland v. Washington, 466 U.S. 668, 687 (1983); Sanders v. State, *Id*. at 857-58.

Counsel's performance is assessed by determining if counsel acted "reasonably within prevailing professional norms under all circumstances." See Sanders at 858. "Reasonably effective assistance may be defined as 'the skill and diligence that a reasonably competent attorney would exercise under similar circumstances.'" Sanders at 858, quoting Thomas v. Lockhart, 738 F.2d 304, 307 (8th Cir. 1984), quoted in Kellogg v. Scurr, 741 F.2d 1099, 1100 (8th Cir. 1984). (Emphasis in Sanders.)

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[1]All Amendments referenced herein are Amendments to the U.S. Constitution.

Appellant bears the burden of proving his grounds for relief by a preponderance of evidence. Rule 27.26(f) .That burden, with respect to an allegation of ineffective assistance of counsel, has been characterized as being "heavy" to bear. Stevens v. State, 560 S.W.2d 599 (Mo. App. 1978); Pickens v. State, 549 S.W. 2d 910 (Mo. App. 1977); Lahmann v. State, 509 S.W.2d 791 (Mo.App. 1974).

It is within these parameters that the contentions by this appellant are considered.

Driscoll's first assertion of ineffective assistance of the contentions by this counsel relates to testimony by one of the state's witnesses, forensic serologist, Dr. Kwei Lee Su.

Trial testimony was that Driscoll had used a knife to stab Officer Jackson.[2] The knife recovered from Driscoll was in evidence. It had been analyzed for blood residue by Dr. Su.

Testimony at trial was that Driscoll had stabbed Jackson several times in the chest, and, subsequently, had stabbed another corrections officer, Harold Maupin, in the shoulder.

Jackson had type 0 blood. Maupin had type A blood.

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[2]For a more complete recital of the facts in the criminal case, see State v. Driscoll, 711 S.W.2d at 514, and State v. Roberts, 709 S.W.2d 856 (Mo. banc 1986). Roberts evolves from another inmate's participation in the stabbing death of Officer Jackson.

Kwei Lee Su testified at trial that the knife recovered from Driscoll had type A blood on it, but did not have any traces of type 0 blood at the time it was analyzed at the Missouri State Highway Patrol laboratory. In response to questions by the prosecutor, Su testified that she had performed an antigen test which disclosed type A blood on the knife. She was asked what results would occur from the antigen test if both types A and 0 blood were present. Dr. Su explained that the type A blood would be revealed but the type 0 blood would not be revealed.[3]

No inquiry was made by either the prosecutor or defense counsel as to whether other tests were performed which would have shown the presence of type 0 blood even though type A blood was present.

The state, in its closing argument, argued that the fact that the analysis of the blood on Driscoll's knife did not show any type 0 blood present was meaningless because there was type A blood present and, by the antigen test, if types A and 0 are mixed, only type A is revealed.

At the evidentiary hearing on appellant's 27.26 motion, Dr. Su testified that two tests were performed on the knife recovered from Driscoll. The first test, the Thread method, was for antigen determination. The second, the Lattes method, was for antibody determination.

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[3]The following question and answer were asked and given:

Q. So the presence in the mixture of A and O -- the presence of A, because of the reaction that you used, masks the presence of O, doesn't it?

A. With this method, yes.

Dr. Su testified that the masking effect which precludes discovery of the presence of type 0 blood when type A blood is present applies to the antigen test, or Thread method, not to the Lattes test. She testified that her report did not distinguish between the two tests performed. The report did indicate that type A blood was present on the knife.

Driscoll's trial counsel was called as a witness at the evidentiary hearing on the 27.26 motion. His testimony was that the information he had at trial was that blood on the knife used by Driscoll was not the same blood type as that of Officer Jackson and, at the time of trial, he was not aware of the existence of scientific evidence that would have rebutted the "masking argument" made by counsel for the state.

Appellant asserts that his representation at trial was deficient in that his trial counsel failed to develop scientific evidence to show evidence to show that Officer Jackson's blood was not on the knife. He claims that he was prejudiced for the reason that, had the presence of Officer Jackson's blood on the knife in evidence been precluded, the result of Driscoll's trial would likely have been different.

The hearing court found that although Driscoll's trial counsel did not cross-examine Kwei Lee Su regarding the antibody test performed on the knife, the cross-examination did make known to the jury the fact that the antigen test did not disclose Officer Jackson's blood on the knife.

The hearing court further found that there was no evidence that the state withheld the results of any tests performed on the knife. The conclusion reached by the hearing court was that Driscoll was not prejudiced by trial

counsel's failure to present evidence regarding the antibody test and, "in view of all of the evidence presented at trial it is unlikely that testimony regarding the antibody test would have affected the outcome of the trial."

Other evidence at trial included two eyewitnesses who testified that they saw Driscoll stab Officer Jackson; evidence that Officer Jackson's blood was found on clothing which Driscoll discarded in his cell after the stabbing; and, incriminating statements by Driscoll.

The hearing court's findings and conclusions with respect to trial counsel's cross-examination of Dr. Su were not clearly erroneous.

Driscoll next asserts that his trial counsel was ineffective for not challenging Juror Helen Harris for cause.

Prospective jurors were advised that there would be evidence of drinking and intoxication at the time when Officer Jackson was killed.

During ***voir dire***, Juror Harris expressed doubts about whether she could give fair consideration to issues involving drunkenness. Mrs. Harris advised the court that her daughter was killed as a result of an automobile accident in which she was struck by an automobile that was operated by a drunk driver.

Following a series of questions and answers in which Juror Harris expressed the grief she had experienced as a result of her daughter's death and stated that she was unsure about whether she "could give a fair trial to an individual where drunkenness might be alleged," the following questions and answers were exchanged between the prosecuting attorney and Mrs. Harris:

MR. FINNICAL [prosecutor]: Remember when we were all talking about how we compartmentalize our mind? Can you put the experience that you had with alcohol and the death of your loved one -- can you put that in that little compartment and decide this case only on the facts that you hear and the law in the instructions that the Judge gives you?

VENIREPERSON HARRIS: I think what the Judge gives me -- I believe I can be honest with you. I'll tell you my honest feelings.

MR. FINNICAL: Okay. Do you think you can put that deep experience that you had over in the corner of your mind?

VENIREPERSON HARRIS: But, you see, I'm awful bitter for it.

MR. FINNICAL: I understand. My question is -- we just kind of need whether you think you can do it or not?

VENIREPERSON HARRIS: I probably can.

MR. FINNICAL: Thank you.

Trial counsel made no challenge for cause as to Mrs. Harris. She was selected as a juror in the criminal case.

At the evidentiary hearing on appellant's 27.26 motion, Driscoll's trial counsel testified that he believed

Mrs. Harris. had been rehabilitated by her responses to the questions asked by Mr. Finnical. He further testified that he had intended to present evidence that there were guards who were responsible for bringing liquor into the prison and that this had been an element in the riot which occasioned Officer Jackson's death. Driscoll's trial counsel expressed the further opinion that he believed having someone on the jury who was opposed to alcohol might work to his client's advantage. He stated that the decision to leave Mrs. Harris on the jury was, in part, trial strategy.

The hearing court found that:

> [T]rial counsel made a deliberate decision to leave Juror Helen Harris on the jury panel, despite her views on consumption of alcohol, due to the anticipated evidence that a certain guard or guards may have brought alcohol into the prison, and counsel believed such evidence would be viewed by Juror Harris as favorable to the defendant;
>
> . . . .

We do not find the hearing court's finding to be clearly erroneous. Trial strategy is not a basis for attack on the issue of competency of counsel. Brown v. State, 495 S.W.2d 690, 694 (Mo.App. 1973). As noted in Strickland, 466 U.S. at 689:

> It is all too tempting for a defendant to second-guess counsel's assistance after con-viction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citations

> omitted.] A fair assess-ment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

We do not find that the hearing court erred in concluding that the failure to challenge Juror Harris for cause was deficient performance by Driscoll's trial counsel. The conscious decision which the trial counsel reached was reasonable within prevailing professional norms under the circumstances of the case.

Driscoll next claims that he was denied effective assistance of counsel for the reason that his trial counsel failed to object to certain statements by the prosecutor about the "capital sentencing process." He asserts that the prosecutor, during *voir dire*, in his opening statement and in his closing argument, made incorrect statements about the law. He then, alternatively, asserts that even if those statements were correct, they lessened the jury's sense of responsibility for making a decision to impose the death penalty. Driscoll asserts that had the statements about which he complains not been made, there exists a reasonable probability that the death penalty would not have been assessed by the jury.

The statements about which appellant complains referred to the relative roles of the trial judge and the jury in the imposition of the death penalty. The prosecutor made statements and arguments that the jury's imposition of the death penalty, as the punishment in this case, was a recommendation to the judge which would permit the judge to consider the death penalty as one of two sentencing

alternatives. The prosecutor suggested to the jurors that they each had an individual vote, but, that the Judge also had a vote. He advised the jury that, in order for Driscoll to receive the death penalty, "It takes thirteen." The prosecutor summed up these statements as, "What I'm saying is that the final decision is up to the Judge."[4]

The hearing court found that the statements and arguments made by the prosecutor in this regard were not violative of Driscoll's right to due process and that Driscoll's trial counsel's failure to object did not constitute ineffective assistance of counsel. The hearing court concluded that the statements and argument made by the prosecutor did not constitute conduct of the type prohibited by Caldwell v. Mississippi, 472 U.S. 320 (1985). The hearing court further found that Driscoll's direct appeal of his underlying criminal determined these issues. Appellant asserts that those findings and conclusions by the hearing court were in error.

The hearing court's findings and conclusions as to this issue are not clearly erroneous.

The substance of the actions which Driscoll asserts as deficient conduct by his trial attorney was reviewed on direct appeal of the criminal case on a claim that the prosecutor's statements constituted "plain error." In State v. Driscoll, this Court held that a statement by the prosecutor informing the jury that their verdict, in a death penalty case, served only as a recommendation to the trial judge constituted a correct statement of the law, pursuant to Rule

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[4]Excerpted commentary by the prosecutor which is illustrative of the statements about which appellant complains may be found in footnote 3 of ***State v. Driscoll***, 751 S.W.2d at 514-15.

29.05, which gives a trial court "power to reduce . . . punishment." State v. Driscoll, Id. at 515, citing State v. Roberts, 709 S.W.2d 857 (Mo. banc 1986).

Appellant urges this Court to now hold otherwise. We decline to do so.[5]

In State v. Driscoll, 711 S.W.2d at 515, the Court held Caldwell, to be distinguishable from the facts in Driscoll in that the statements of the prosecutor were not clearly inaccurate statements of law.

The points which Driscoll now raises with respect to the prosecutor's statements and arguments that a jury's verdict assessing the death penalty is a "recommendation" to the Judge and that the Judge has a "thirteenth vote" were raised and determined adversely to Driscoll in the direct appeal from his criminal conviction. The holding in Driscoll that Driscoll's contentions failed "to reveal plain error of any degree which if left uncorrected would result in either manifest injustice or a miscarriage of justice" is determinative. Even if trial counsel's performance was said to have been deficient in not objecting to the remarks about which Driscoll now complains, the holding in Driscoll's direct appeal suffices as a determination that such conduct did not deprive Driscoll of a fair trial, "a trial whose result is reliable." Strickland v. Washington, 466 U.S. at 687. Appellant is not entitled to relitigate this issue since it was decided in his direct appeal. A post-conviction proceeding

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[5]It is appropriate to note that Roberts admonished prosecutors not to use the type of argument of which Driscoll now complains in the future. The suggestion was made in the concurring opinion of Blackmar, J., in Driscoll, " . . . that the Court's position on the matter is unchanged." State v. Driscoll, 711 S.W.2d at 518.

is not a "substitute for a second appeal." Rule 27.26(b)(3); Richards v. State, 495 S.W.2d 442, 443 (Mo. 1973).

Driscoll next complains that he was denied effective assistance of counsel because his trial counsel failed to request an instruction on second degree felony murder. The hearing court held that second degree felony murder was neither supported by the evidence nor a lesser included offense of capital murder. That determination is not clearly erroneous.

The jury in Driscoll's underlying criminal case was instructed on second degree murder as a lesser included offense. Second degree murder is the proper offense to be submitted in a capital case. State v. Clark, 652 S.W.2d 123, 128 (Mo. banc 1983). As stated in Clark, "second degree felony murder is not a separate and substantive offense . . . ." Driscoll's trial counsel was not deficient in failing to request a second degree felony murder instruction.

Driscoll also asserts that he had ineffective assistance of counsel for the reason that his trial counsel failed to object to certain testimony and closing arguments by the prosecutor. He claims that the trial court failed to afford him due process of law because it permitted the prosecutor to make personal references and statements during the course of the trial.

The hearing court held that the trial record did not support Driscoll's claim in this regard. Appellant asserts that finding to be in error.

Appellant contends that, at trial, the prosecutor repeatedly placed "incompetent and inadmissible evidence, arguments, inferences, and his own unsworn testimony before the jury," He asserts that trial counsel failed to

object and, thereby, denied him effective assistance of counsel.

In his brief, appellant sets out three series of questions by the prosecutor and responses of witnesses to those questions; one narration by the prosecutor offered as an objection; and, two statements made by the prosecutor during closing argument consisting of two or three sentences each. The quotations contain personal references.[6]

We do not find the hearing court's determination of this point to be clearly erroneous.

Trial strategy is an element in an attorney's decision to pose an objection to a particular question or statement. Considering the trial record as a whole we do not find that trial counsel was deficient in not posing objections to those questions and other statements about which appellant now complains. Neither do we find that if the questions and other statements had been stricken from the record, that a reasonable probability exists that the result in Driscoll's trial would have been different. Strickland v. Washington, 466 U.S. 687.

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[6]*E.g.*, the first series of exchanges which appellant sets out in his brief is:

Q. Now, I believe you indicated that the prosecutor of this case threatened to prosecute Eddie Rugg -- is that your testimony?

A. Yes.

Q. Well, I'm the Prosecutor. Would it surprise you to learn that such an event never took place?

The other exchanges and statements were in similar format and contained similar personal points of reference.

The second part of this complaint by appellant asserts that the hearing court erred in finding that the trial court did not deny Driscoll due process of law as guaranteed by the Fourteenth Amendment by "its failure to control the prosecutor."

This point was not raised on direct appeal although it alleges trial error. Appellant has failed to show a basis for his allegation that the conduct of the prosecutor resulted in a denial to him of any fundamental fairness afforded by his constitutional guarantee of due process of law. He has not shown the existence of rare and exceptional circumstances which would entitle this issue to receive further consideration. Dixon v. State, 624 S.W.2d 860, 862-63 (Mo.App. 1981); Rule 27.26(b)(3). The point is denied.

Driscoll next complains that he was denied effective assistance of counsel because his trial counsel did not object to the prosecutor's argument, in the punishment phase of Driscoll's capital murder trial, that a sentence other than death could lead to future danger to prison personnel where Driscoll would be confined. He also complains that the trial court denied him due process of law by failing to control the prosecutor so as to prevent that argument from being made to the jury.

The prosecutor argued that the death penalty was an appropriate verdict for the jury to reach in Driscoll's murder trial. The prosecutor asked what was to be done with Driscoll if the jury's punishment was life imprisonment without probation or parole for fifty years. He asked the jury how the guards were to be protected and characterized Driscoll as someone "who butchers people -- who can't live outside and can't live inside."

Driscoll's trial counsel did not object to that part of the prosecutor's closing statement.

The hearing court found against Driscoll on this point finding that the prosecutor's argument was a general plea for law enforcement and was made to impress the seriousness of the case upon the jury.

Driscoll relies upon the holdings in other criminal cases that although the State may argue that a severe penalty should be imposed to deter others from criminal acts, the State may not argue that a severe punishment is necessary to deter the defendant on trial from committing other crimes in the future. He cites State v. Raspberry, 452 S.W.2d 169 (Mo. 1970), for this proposition and State v. Mobley, 369 S.W.2d 576 (Mo. 1963), for the proposition that due process of law required the hearing court to have imposed controls on the prosecutor to have prevented such arguments to the jury.

As noted in State v. Antwine, 743 S.W.2d 51, 71 (Mo. banc 1987), neither Raspberry nor Mobley involved a death penalty case which utilized a bifurcated proceeding for its guilt and punishment phases.

Antwine was a capital murder case in which one of the aggravating circumstances presented to the jury in its punishment phase was that the defendant committed murder in a place of lawful confinement. A similar argument was made to the jury in Antwine as was made in Driscoll's criminal trial, viz., that if the death penalty were not imposed, Antwine would pose a danger to other inmates and correctional personnel. As in Driscoll's criminal trial, that argument was made during the punishment phase, after a verdict of guilty of capital murder had been returned. In Antwine, an objection to that argument was made and

overruled. This Court held, as a matter of first impression as to that issue, that when the aggravating circumstance of murder committed by an inmate in a lawful place of confinement is present, "a jury may properly consider whether an incarcerated criminal defendant is likely to place the lives of corrections personnel and other prisoners at risk if a sentence other than death is imposed." Antwine, 743 S.W.2d at 71.

Driscoll's trial counsel cannot be found ineffective for failing to make a nonmeritorious objection. Bannister v. State, 726 S.W.2d 821, 825 (Mo.App. 1987); Shaw v. State, 686 S.W.2d 511, 516 (Mo.App. 1985).

The trial court's determination was not clearly erroneous. The circumstances in Driscoll's criminal trial were akin to those in Antwine. Under those circumstances, Driscoll was not denied due process of law by the court permitting the prosecutor to make the closing argument about which Driscoll now complains.

Driscoll next asserts that his trial counsel failed to present evidence during the punishment part of his criminal trial to show that he had saved the life of another inmate during a previous incarceration. He contends this constituted ineffective assistance of counsel and that the hearing court erred by finding otherwise.

The hearing court found that Driscoll's trial counsel testified at the evidentiary hearing that he was unaware that Driscoll had received any commendation for aiding another inmate until Driscoll testified to that effect at trial. The hearing court stated, in its findings, that the trial counsel testified that Driscoll had not told him about a commendation prior to the hearing. The hearing court further noted that Driscoll's counsel at the evidentiary

hearing presented no proof that evidence of such a commendation existed.

The hearing court concluded that Driscoll had not demonstrated that such evidence, if it existed, would have benefitted him. That court found it to be "just as likely that additional evidence regarding the previous incarcerations of [Driscoll] would have only highlighted the fact that he was a career criminal . . . ." That court found that Driscoll failed to demonstrate that his trial counsel, through action or inaction, prevented him from presenting evidence which would have been helpful to him at trial and failed to show that the asserted inactions of counsel were of such character that it resulted in a substantial deprivation of right to a fair trial, citing Thomas v. State, 665 S.W.2d 621, 624 (Mo.App. 1983).

The hearing court's determination that Driscoll failed to prove any deficiency in his trial counsel's performance with respect to this point is not clearly erroneous.

Driscoll next asserts that his trial counsel was ineffective in that the counsel failed to impeach certain testimony of witness Joseph Vogelpohl.

Vogelpohl testified in the criminal trial. Vogelpohl was an inmate at the training center at the time of the riot. At trial, Vogelpohl testified that Driscoll had asked with respect to the stabbing of Officer Jackson, "Did I take him out JoJo, or did I take him out?"

During the evidentiary hearing on Driscoll's 27.26 motion, his trial counsel was asked about other statements alleged to have been made by Vogelpohl to a Mr. Schreiber and a Mr. Wilkinson to the effect Driscoll had said that

Officer Jackson "had been stuck" or that Driscoll had "said something about took out one of the guards."

Both Wilkinson and Schreiber testified.

Wilkinson testified that he was a casework supervisor at the Training Center when the riot occurred. He had participated in an internal administrative hearing following the stabbing of Officer Jackson. Wilkinson testified that Vogelpohl had related a conversation with Driscoll in which Driscoll "said something about the fact -- 'took out one of the guards.'" That statement was made at a hearing conducted eighteen days after the stabbing.

Schreiber testified that he was chief internal affairs officer with the Missouri Department of Corrections and Human Resources at the time of the riot. He had interviewed Vogelpohl after the riot. Schreiber testified that Vogelpohl had said that Officer Jackson had been stabbed. Vogelpohl had also provided Schreiber with a written statement in which Vogelpohl stated, "one of the officers, which was Officer Jackson, had been stuck."

The hearing court made a finding of fact that Driscoll's trial counsel did not attempt to impeach Vogelpohl with prior statements Vogelpohl had made to Schreiber or Wilkinson.[7] That court further found that the

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[7]The hearing court found that:

Robinson [trial counsel] did not attempt to impeach Vogelpohl with a prior statement made to Mark Shriver [sic] where in [sic] Vogelpohl said movant [Driscoll] had stated that "one of the officers, which was Officer Jackson, had been stuck." Neither did Robinson attempt to impeach Vogelpohl with another earlier statement made to Mr. Wilkinson that movant had "said something about took out one of the

various statements of Vogelpohl were not directly inconsistent "because the terms 'took out' in prison slang means 'killed' and the term 'stuck' in prison slang means 'stabbed' and Officer Jackson was killed by stab wounds."

The hearing court concluded that any inconsistencies between Vogelpohl's trial testimony and the prior statements were "minor and inconsistent."

The hearing court's determination was not clearly erroneous. The record from the evidentiary hearing supports the hearing court's interpretations of the words "took out" and "stuck." Using those meanings, there was no showing that Vogelpohl had made prior inconsistent statements which Driscoll's trial counsel could have used to impeach Vogelpohl's testimony at trial. Driscoll's trial counsel was not deficient in failing to attempt to impeach Vogelpohl's testimony by means of prior inconsistent statements. There was no showing that Vogelpohl had made prior inconsistent statements.

For his final point on appeal, Driscoll asserts ineffective assistance of counsel for "failure to object to certain trial error in a motion for new trial, and present said grounds on appeal . . . ." He then references various paragraphs in his Rule 27.26 motion contending that those issues were not presented to the trial court in the motion for new trial or to this Court on the direct appeal. He asserts that he was denied review of those points or that they received "only plain error review."

The complaints made in Driscoll's final point include matters previously addressed in this opinion. Driscoll includes the issues previously discussed with

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guards."

respect to Juror Harris; the arguments made to the jury by the prosecutor regarding the capital sentencing process and the relative responsibilities of the jury and the court; the content of questions by the prosecutor during trial, forms of objections posed by the prosecutor and some of the prosecutor's closing argument; and, the argument by the prosecutor that the argument by the prosecutor that to impose punishment other than death would present future risk to others within the prison system.

These issues were previously discussed and determined adversely to Driscoll.

Driscoll's final point on appeal does refer to two areas not discussed and determined otherwise presented in this appeal. He contends the hearing court erred in not finding ineffective assistance of counsel by trial counsel failing to object and raise in the motion for new trial issues relating to inquiry on voir dire of Juror McIntosh and to certain trial testimony of witness Edward Rugg.

Driscoll contends that his trial counsel should have challenged Juror McIntosh for cause based upon answers given during voir dire. Driscoll contends that Juror McIntosh gave responses to questions posed on *voir dire* indicating "that she would automatically recommend the death penalty in the event of a finding of guilty of capital murder."

At Driscoll's trial, during *voir dire*, his trial counsel asked a general question to the panel which invoked a response from Juror McIntosh. The following exchange occurred:

MR. ROBINSON [trial counsel]:

Another thing that Mr. Finnical [prosecutor] did not tell you is that in the first stage of the trial, it is possible that you could find -- although my client is charged with Capital Murder, if you do not find that he's guilty of Capital Murder, you could find him guilty of a lesser crime.

Are you willing to consider a lesser crime of Murder or Manslaughter if the facts only support Murder or Manslaughter and not Capital Murder?

Mrs. McIntosh?

VENIREPERSON McINTOSH: I think I would.

MR. ROBINSON: You say you think you would. I don't want to badger you, but why are you hesitating?

VENIREPERSON McINTOSH: Well if he committed the crime, then he should be punished with the death penalty. If he didn't, then that's another situation.

MR. ROBINSON: But what if the State doesn't prove that he committed Capital Murder, but he might have -- the State might only be able to prove that he committed a lesser crime.

VENIREPERSON McINTOSH: Such as what?

MR. ROBINSON: Second Degree Murder Manslaughter. If the facts only support a lesser crime, would you still vote for guilty on Capital Murder?

VENIREPERSON MCINTOSH: All right. No -- no.

The part of this exchange about which Driscoll now complains are the following responses. "Well, if he committed the crime, then he should be punished with the death penalty. If he didn't, then that's another situation." Driscoll complains that no challenge for cause was then made to Juror McIntosh.

The hearing court concluded that when Juror McIntosh's responses are considered in the context of other responses she gave during *voir dire*, there was no showing that she would indiscriminately impose the death penalty nor that she would be unable to follow the instructions of the court nor be unable to consider penalties other than the death penalty if the defendant in the criminal case was convicted of capital murder.

Prior to the exchange on voir dire quoted above, other inquiries had been made about the death penalty.

During inquiry by the prosecutor, specific questions were directed to Mrs. McIntosh. After stating the burden of proof in criminal cases to be beyond a reasonable doubt and inquiring whether the panel members understood that the same burden of proof applied in cases in which the death penalty is a possible punishment, Juror McIntosh was asked: "Now, what do you think of the death penalty?"

Mrs. McIntosh replied: "I think if it's justified, it should be given."

The record from Driscoll's criminal trial does not establish that Driscoll was entitled to have a challenge for cause sustained as to Juror McIntosh if such a challenge had been made. Compare State v. Johns, 679 S.W.2d 253, 263-65 (Mo. banc 1984) *cert. denied*, 470 U.S. 1034 (1985) "If there was no trial error, counsel cannot have been ineffective for failure to pursue it." Bannister v. State, 726 S.W.2d 821, 825 (Mo.App. 1987).

Considering all of Juror McIntosh's responses to questions addressing the death penalty and its applicability, the conclusion by the trial court that Driscoll's trial counsel was not deficient so as to deny Driscoll effective assistance of counsel by not challenging Juror McIntosh for cause is not clearly erroneous.

Driscoll also asserts that he was denied effective assistance of counsel because his trial counsel did not timely object to certain testimony of witness Edward Rugg.

Rugg was an inmate at the Missouri Training Center for Men at the time of the riot.

Rugg testified that he saw Driscoll stab Officer Jackson. He was interrogated on two occasions following the stabbing. Rugg had told investigators at the correction center that he saw Driscoll stab Officer Jackson. Rugg was asked what he told investigators the second time he was questioned. He responded:

> A. [Rugg] Virtually the same thing I told them the first time when they called me back the second time. They was trying

> to tell me that they didn't believe my story. But when I told them the same thing again and then when they brought me back the second time, they said they believed me then because they had talked with Mr. Driscoll and he had confessed to it.

The prosecutor began asking a further question which Driscoll's trial counsel interrupted to object to Rugg's response as hearsay and to ask that it be stricken.

The trial court overruled the motion and denied the request to strike saying that the question had been asked and answered and that time had passed for the objection.

Driscoll contends the failure of his trial counsel to timely object denied him effective assistance of counsel. The hearing court concluded that Rugg's statement was volunteered by the inmate, was inadvertent and isolated. The hearing court concluded that there was no evidence that the testimony prejudiced the outcome of the trial and that the failure to object "did not rise to constitutional proportions" and, at most, was trial error which cannot be raised in proceedings for post-conviction relief, citing Hudson v. State, 612 S.W.2d 375, 378 (Mo.App. 1980), and Joiner v. State, 621 S.W.2d 336, 338 (Mo.App. 1981).

The hearing court's conclusion with respect to this issue is not clearly erroneous.

Lastly, Driscoll asserts that he did not receive effective assistance of counsel on appeal. Driscoll complains that the attorney who handled his direct appeal failed to raise issues presented by his post-trial motion for new trial.

At evidentiary hearing, the attorney who handled the direct appeal testified that she elected to pursue the issues which she evaluated as being meritorious.[8] The hearing court found that action was a matter of "strategic choice" by Driscoll's attorney.

Our review of this case, including a review of the transcript filed with this Court in Driscoll's direct appeal, does not show denial of effective assistance of counsel on the direct appeal of Driscoll's criminal case.

The judgment of the hearing court is affirmed.

JOHN E. PARRISH, Special Judge

Billings, C.J., Welliver, Rendlen and Higgins, JJ., concur; Blackmar, J., concurs in separate opinion filed. Donnelly, J., retired January 1, 1989. Robertson, J., not sitting. Covington, J., not participating because not a member of the Court when the cause was submitted.

[8]A record was made as to this issue at the evidentiary hearing on the Rule 27.26 motion so as to permit the issue to be reviewed as part of this appeal.

SUPREME COURT OF MISSOURI
EN BANC

ROBERT DRISCOLL,	)	
	)	
Appellant,	)	
	)	
vs	)	No. 70717
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

CONCURRING OPINION

The Court is indebted to Judge Parrish for his fine opinion, in which I concur.

The principal opinion gives more weight than I would to the holding on Initial appeal about the effect of possibly objectionable argument. My examination of the trial transcript persuades me, however, that counsel was not ineffective in his handling of a case in which the defense was very difficult.

Charles B. Blackmar, Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2993EMSL
No. 94-3266EMSL

Robert Driscoll, *

Appellee/Cross-Appellant, *

vs. * Order Denying
* Petition for Rehearing
Paul Delo, * with Petition for
* Rehearing En Banc
Appellant/Cross-Appellee. *

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 1, 1996

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2993EMSL

Robert Driscoll, *

Appellee, *

vs. *

Paul Delo, *

Appellant. *

Appeals from the United States
District Court for the
Eastern District of Missouri

No. 94-3266EMSL

Robert Driscoll, *

Appellant, *

vs. *

Paul Delo, *

Appellee. *

JUDGMENT

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in these causes is affirmed in part, reversed in part, and remanded for further proceedings consistent with the opinion of this Court.

December 4, 1995

A true Copy.

ATTEST. Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

TITLE VI--CRIMINAL PROCEDURAL IMPROVEMENTS

Subtitle A--Habeas Corpus Reform

SEC. 601. FILING DEADLINES.

Section 2244 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim shall not be counted toward any period of limitation under this subsection.".

SEC. 602. APPEAL.

Section 2253 of Title 28, United States Code, is amended to read as follows:

"§2253. Appeal

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

"(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

"(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

"(B) the final order in a proceeding under section 2255.

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

"(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).".

SEC. 603. AMENDMENT OF FEDERAL RULES OF APPELLATE PROCEDURE

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"Rule 22. Habeas corpus and section 2255 proceedings

"(a). APPLICATION FOR THE ORIGINAL WRIT.--An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted.

The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

"(b) CERTIFICATE OF APPEALABILITY.--In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.".

SEC. 604. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended--

(1) by amending subsection (b) to read as follows:

"(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

"(A) the applicant has exhausted the remedies available in the courts of the State; or

"(B)(i) there is an absence of available State corrective process; or

"(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

"(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

"(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.";

(2) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(3) by inserting after subsection (c) the following new subsection:

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

"(1) resulted in a decision that was contrary to, or involved an in unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.";

(4) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

"(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

"(A) the claim relies on--

"(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

"(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."; and

(5) by adding at the end the following new subsections:

"(h) Except as provided in title 21, United States Code, section 848, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.".

SEC. 605. SECTION 2255 AMENDMENTS.

Section 2255 of title 28, United States Code, is amended--

(1) by striking the second and fifth undesignated paragraphs; and

(2) by adding at the end the following new undesignated paragraphs:

"A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

"(1) the date on which the judgment of conviction becomes final:

"(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution, or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

"(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

"Except as provided in title 21, United States Code, section 848, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for a movant who is or becomes financially unable to afford counsel shall be in the discretion of the court, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

"(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

"(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.".'

SEC. 606. LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.

(a) CONFORMING AMENDMENT TO SECTION 2244(A).--Section 2244(a) of title 28, United States Code, is amended by striking "and the petition" and all that follows through "by such inquiry." and inserting ", except as provided in section 2255.".

(b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS. --Section 2244(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

"(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for

an order authorizing the district court to consider the application.

"(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

"(C) The court of appeals may authorize the fling of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

"(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

"(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.".

SEC. 607. DEATH PENALTY LITIGATION PROCEDURES.

(a) ADDITION OF CHAPTER TO TITLE 28, UNITED STATES CODE.--Title-28, United States Code is amended by inserting after chapter 153 the following new chapter:

No. 95-1779

IN THE
SUPREME COURT OF THE UNITED STATES,
October Term, 1995

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center

Petitioner,

v.

ROBERT DRISCOLL,
A State Prisoner Under Sentence Of Death,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT ROBERT DRISCOLL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney For Respondent

CAPITAL CASE

QUESTION PRESENTED

Whether the Antiterrorism and Effective Death Penalty Act Of 1996 ("the Act"), Pub. L. No. 104-132, 110 Stat. 1214, applies retroactively to habeas corpus cases in which, before passage of the Act, the mandate had already issued after a decision on the merits by a United States Court of Appeals.

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ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

The Suspension Clause of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the Public Safety may require it.

U.S. Const., art. I, § 9, cl. 2.

In pertinent part, Article III of the United States Constitution provides:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> * * *
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arisisng under this Constitution, the Laws of the United States....
>
> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const., art. III, §§ 1 and 2.

In pertinent part, the Fifth Amendment of the United States Constitution provides:

> No person shall ... be deprived of life, liberty, or property, without due process of law....

U.S. Const., amend. V.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In pertinent part, prior to its revision by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ..., evidenced by a written finding, written opinion, or other relieable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> * * *
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, ... unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (repealed April 24, 1996).

In pertinent part, section 557.036 Mo. Rev. Stat. (Cum. Supp. 1984) ("the general criminal sentencing statute") provides as follows:

> 1. Subject to the limitation provided in Subsection 3 upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.
>
> 2. The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as part of their verdict, unless [sentencing by the jury is waived by the defendant or the state proves that defendant is a recidivist or violent offender]. If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment, then the court may instruct the jury that if it cannot agree on punishment then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.
>
> 3. If the jury returns a verdict of guilty and declares a term of imprisonment as provided in subsection 2 of this section, the court shall proceed as provided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense.

Mo. Rev. Stat. § 557.036 (Cum. Supp. 1984).

In pertinent part Mo. Ann. Stat. § 565.006.2 (Vernon's 1979)(repealed 1984) ("the capital sentencing statute") provided that:

> The jury, or the judge in cases tried by the judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

Mo. Ann. Stat. § 565.006.2 (Vernon's 1979)(repealed 1984).

Missouri Supreme Court Rule 29.05 ("the general sentence reduction rule") provides:

> The court shall have power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive.

Mo. S. Ct. R. 29.05.

STATEMENT UNDER RULE 29.4(b)

Some of Respondent's arguments (against the grant of a writ of certiorari) draw into question the constitutionality of an act of Congress affecting the public interest, the Antiterrorism And Effective Death Penalty Act of 1996 ("the Act"), Pub. L. No. 104-132, 110 Stat. 1214, particularly if the Act were applied and construed as petitioner advocates. The United States has an interest in those matters raised herein which question the constitutionality of the Act. As neither the United States, nor an officer, agency or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No court of the United States has certified to the Attorney General, pursuant to 28 U.S.C. § 2403(a), the fact that the constitutionality of the Act has been drawn into question.

STATEMENT OF THE CASE

Respondent Driscoll generally acknowledges Warden Bowersox's (hereinafter "the State" or "Missouri") Statement of the Case,[1] but adds that substantial additional facts from the trial court record are relevant to his attempt to obtain this Court's discretionary review, and that some of the purported facts are not supported by the State's record citations.

---

[1] Driscoll specifically does not adopt factual allegations directed toward Roy Roberts unless specifically addressed by Driscoll. Generally, the allegations directed toward Roberts are irrelevant to whether Driscoll participated in Jackson's murder, and therefore Driscoll does not address them.

In particular, the evidence of Driscoll actually stabbing the murder victim, Jackson, is very weak. Three different guards who were involved in the struggle only saw Rodney Carr (sometimes spelled Karr in the transcripts) stab Officer Jackson. Transcript ("TR.") at 882 (Halley); id. at 986-88, 991, 1006 (Wilson); id. at 1033 (Hess). None of them saw Driscoll stab anyone, either officers Jackson or Maupin. Id. See also id. at 976 (Maupin). Given the uniform testimony of these guards that Rodney Carr stabbed officer Jackson and the absence of any testimony from any guards that Driscoll stabbed anyone, grave doubt exists as to whether Driscoll stabbed Jackson.

Moreover, the testimony of Dr. Dix, the doctor that did the autopsy on officer Jackson, bolsters the conclusion that Rodney Carr, not Driscoll, killed officer Jackson. Significantly, in response to a question of whether he could determine from the stab wounds whether one or two knives caused the injuries, Dr. Dix stated that "[g]iven the nature of the wounds, I would say that one knife caused them, but I can't be absolutely sure." TR. 1080-81. The unanimous, multiple eyewitness testimony of the prison guards was that Carr stabbed Jackson; the autopsy report points to one knife only being used on Jackson. Thus, only one stabber, Rodney Carr, is implicated by the testimony of the most reliable, non-inmate eyewitnesses and the forensic evidence.

In contrast to this testimony pointing squarely at Rodney Carr as Jackson's stabber, the state only cites the inconsistent, self-serving testimony of inmates, some of whose stories changed

dramatically over time, to implicate Driscoll in the stabbing of Jackson. App. at A7 (citing transcript pages 909-10, 913, 1023, 1042-43). Those inmates are Joseph Vogelpohl and Edward Ruegg (sometimes spelled Rugg in transcripts). Id. (not including TR. 1023). the State also cites the testimony of corrections officer Hess as another eyewitness identification of Driscoll, Id. (citing TR. 1023), but the State is mistaken as to Hess' testimony. Hess testified that Rodney Carr, not Driscoll, was the only person he saw stab officer Jackson. TR. 1033.

Unlike the consistent testimony of the guards, the testimony of inmates Vogelpohl and Ruegg was unreliable, inconsistent and contradicted. Vogelpohl and Ruegg stated that Driscoll stabbed Jackson, but Vogelpohl did so only after failing to identify Driscoll as one of the stabbers in the course of several interviews as part of the State's investigation of the riot, Resp. Ex. F, Rule 27.26 Motion Hearing Transcript ("PCR TR.") 11-21. See Driscoll v. Delo, 71 F.3d 701, 709-11 (8th Cir. 1995), Appendix to Petition For Writ Of Certiorari, ("App.") at A17-A22; Magistrate's Review and Recommendation ("R&R"), App. A89-A92. Cf. Resp. Ex. B-1, Direct Appeal Legal File ("DALF") 100-01 (statement of Vogelpohl given the day after the riot which (1) only indicated that he saw Driscoll punch, not stab Jackson, (2) that Driscoll said only that "one of the officers...had been stuck," while it (3) failed to mention anything like the statement attributed by Vogelpohl to Driscoll at trial that Driscoll said immediately after the incident "[d]id I take him

out JoJo[,] or did I take him out?"). Likewise, Ruegg's identification of Driscoll as a stabber occurred only after he had been severely beaten. TR. 1048, 1057-59. On the stand, Ruegg admitted that he told the guards "anything they wanted to hear, just so they would leave me alone." TR. 1058-59. Moreover, Ruegg's testimony was contradicted by Ruegg's admissions to two other inmates that he did not see Driscoll stab Jackson. See TR. 1593, 1595-96, 1598-99, 1606 (testimony of inmate Lassen) (also contradicting inmate Vogelpohl); id. at 1667 (testimony of inmate Hobbs).

At the Rule 27.26 Hearing ("PCR Hearing") Driscoll's trial lawyer, Robinson, testified that he failed to cross examine inmate Vogelpohl about Vogelpohl's prior inconsistent statements. PCR TR. 77-78. Robinson also admitted that his failure to cross examine Vogelpohl was not a matter of trial strategy. Id.

All that Driscoll admitted was that he had stabbed a guard. TR. 1258, 1260. He did not admit that he stabbed Jackson. The knife which was identified as allegedly being Driscoll's, Ex. 24, had only type A blood on it, TR. 1856, the same as Officer Maupin's (who had been stabbed in the shoulder). TR. 1258. Officer Jackson had type O blood. Id. The State's blood expert, Dr. Su, testified that with the antigen test, type A blood "masks" type O blood. Id. at 1212-13. She agreed that the knife only had type A blood on it and that anything else (e.g., whether it had type O blood on it also) would just be speculation. TR. 1217. Driscoll's attorney failed to ask her about whether any

other tests had been performed that could have identified whether type O blood was on the knife. Driscoll's lawyer also failed to ask Dr. Su any questions to refute the theory that Jackson's type A blood was simply wiped off when Maupin was stabbed.

At the PCR Hearing Dr. Su testified that another test (the "Lattes" test) had been performed, which does not allow "masking" of blood and established that no type O blood was found on the knife. PCR TR. 29-30. She acknowledged that had she been asked at trial, she would have had to admit that "there was no type O blood on that knife," and that she could not say that a second stabbing would clear the blood from a first stabbing from the knife. Id. at 32.

Driscoll's lawyer testified at the PCR Hearing that he received the blood test results, PCR TR. 74-75, that he did not know of any other tests that could have been performed on the knife, id. at 74, that he was unaware of any scientific evidence that could have rebutted the State's "masking" argument, id. 91, and that he did not interview Dr. Su before her trial testimony. Id. at 74.

During voir dire the prosecution made a number of inaccurate and misleading statements about the jury's role in sentencing. Those statements basically told the jury that it was only a recommending body, that the judge acts as a thirteenth juror and sentences the defendant, and that it "doesn't matter whether you return a recommendation for the death penalty" because the judge "can overrule you." TR. 555. See also TR. 480-83, 512, 519,

520, 533-34, 538, 540, 577, 580, 606, 607. See generally 71 F.3d at 711 n.8, App. at A23 n.8 (court of appeals opinion); App. at A73-A74 (magistrate's opinion reprinting prosecutor's comments). This pattern continued into closing argument; the prosecutor repeatedly told the jury that it was just recommending a sentence to the judge to allow him to consider both options. See, e.g., TR. 2003, 2004, 2103, 2106. See generally App. at A74-A75 (reprinting prosecutor's comments). Driscoll's lawyer never objected to any of these references at trial. He testified that he did not realize that the prosecution's use of the word "recommend" was objectionable. PCR TR. 82.

The jailhouse riot involved a mob of as many as 40 inmates. TR. 1027. See also TR. 1385 (30 inmates); id. at 1356 (20 or more inmates involved). These were inmates who were drunk, having consumed substantial quantities of "hooch" or homemade wine. TR. 802, 903-04, 912, 1124-25; DALF 134. The riot was precipitated by the raucous, drunken behavior of inmate Jimmy Jenkins, DALF 128, TR. 1398, who was so disruptive that he had to be forcibly removed from his cell and wing of the prison. DALF 128; TR. 1040-41. His attempted removal from the wing by Officer Jackson and others triggered the rush on the guards by other drunken inmates who didn't want Jenkins removed. TR. 1040-41. During the drunken melee, Jackson was stabbed to death, and Officer Maupin was stabbed in the shoulder. TR. 973. Inmate Charles Bandy testified that Jimmy Jenkins stabbed Officer Jackson. TR. 1314, 1318.

After the melee, Officer Darnell discovered fifteen to twenty knives or other weapons were left on the scene, three of which appeared to Darnell to be bloody. TR. 1553, 1571-72. Curiously, two of those knives were "lost," as the State could produce only one knife with blood on it at Driscoll's trial. TR. 1216.

Obviously, the rioting inmates faced all sorts of consequences for their participation, ranging from beatings by guards, TR. 915-16, 920, 935-38 (Vogelpohl testimony); TR. 1043, 1048, 1057-59 (Ruegg testimony); TR. 1362 (Watkins testimony); TR. 1394-98, 1406-07 (Boland testimony); TR. 326-37 (Driscoll testimony), to conduct violation write-ups, to transfers to other more secured prisons or areas, or to criminal prosecution. E.g., TR. 921, 927, 931 (Vogelpohl); TR. 1050 (Ruegg); DALF 105, 122, 151 (Vogelpohl, Jenkins and Ruegg). Among the drunken inmates[2] amidst the melee were the only "eyewitnesses" to Driscoll's alleged stabbing of Officer Jackson, inmates Ruegg, TR. 944, 1041, 1043, 1045, 1322, 1354, 1401; DALF 142, and Vogelpohl. TR. 909, 916, 1354. Of course, for participating in the riot, inmates Ruegg and Vogelpohl received conduct violation citations, DALF 105, 151; TR. 927, 931,[3] and thus were especially subject to pressure to "cooperate" with the investigation. They did, and

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[2] TR. 912, 945-46, 952 (Vogelpohl, an alcoholic, drank 64 ounces of wine and was "high"); TR. 1037-38 (Ruegg had been drinking wine and was "light-headed").

[3] See also DALF 122 (similar conduct violation issued to inmate Jenkins).

rather than receive the punishment they deserved, they were instead rewarded. TR. 924, 931, 1052.

The beatings administered by prison authorities also encouraged inmates Vogelpohl and Ruegg to cooperate with the investigation. The beatings that Ruegg received frightened him, TR. 1057-58, and made him tell the guards "anything they wanted to hear just so they would leave me alone." TR. 1058-59. Vogelpohl's repeated beatings may have taken their toll, also, and led him to change his story, though he insists that he changed his story only after he felt safe and was placed in protective custody. TR. 915-16, 920-21, 935-38.

Other facts will be woven into the argument portion of this brief as appropriate.

ARGUMENT

Petitioner contends that this Court should spend its valuable time on this case "to give guidance to the lower courts" on the application of Section 104(3) of The Antiterrorism And Effective Death Penalty Act Of 1996 ("the Act"), Pub. L. No. 104-132, 110 Stat. 1214, amending 28 U.S.C. § 2254(d). See generally App. at. A165-A172.[4] This Court should deny review of this case.

[4] The Appendix mis-numbers the sections of the Act. Section 601 should be section 101, section 602 should be section 102, etc.

In addition, the State only included the Chapter 153 revisions to the habeas corpus statutes in the Appendix to its petition for writ of certiorari. Section 107 of the Act adds a new chapter, Ch. 154, which is relevant to the retroactivity analysis. Accordingly, respondent includes those provisions in an appendix to this Brief In Opposition.

This case involves a narrow, unique fact situation and is therefore unlikely to offer much in the way of precedential value. It is not an appropriate vehicle for explaining to the lower courts whatever differences there may be, if any, in the standard of review applicable to habeas cases under the old and new habeas statutes, because in this case, the result under either statute is the same: respondent received ineffective assistance of counsel based on the specific, unique facts of this case for two different, individually sufficient, errors by trial counsel; in addition, based on the unique facts of the prosecutor's argument and then effective, now repealed, Missouri law[5] regarding capital sentencing procedures, the prosecutor's argument misleadingly and inaccurately characterized Missouri law and improperly minimized the jury's sentencing responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

Furthermore, there is no conflict in the circuit courts of appeals. The only circuit court cases that have addressed whether the Act is retroactive have concludded that it is not. See infra at 23. This Court should also deny review in this case

[5] Mo. Ann. Stat. § 565.006.2 (Vernon's 1979)(repealed 1984) ("the capital sentencing statute") provided that:

> The jury, or the judge in cases tried by the judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

Id. (emphasis added).

because it is evident that the circuit courts are fully able to discern the Act's non-retroactivity, and there is no conflict in the circuits that needs clarification.

IV. Even If The Antiterrorism And Effective Death Penalty Act Of 1996 Were Retroactive To Cases In Which The Court Of Appeals Had Issued Both An Opinion Disposing Of The Case And The Mandate, This Court Should Still Deny Review Because The Judgment In This Case Would Be Not Be Affected By The New Habeas Statute.

First, as to the ineffective assistance of counsel ("IAC") claims, the Act had no effect upon this Court's directives for analyzing IAC claims as set forth in Strickland v. Washington, 466 U.S. 668 (1984). What was ineffective before remains ineffective now.

All that the State asserts may have changed under the Act is that the federal Courts are to be more deferential of State court rulings of law that are "reasonable." Pet. at 15. (Mo. S. Ct.'s analysis was not "unreasonable"). Because the state court cited Strickland and purported to do Strickland analysis, the State concludes that "respondent cannot colorably contend that the Missouri Supreme Court's decision was contrary to clearly established federal law" or "an unreasonable application of the Strickland analysis." Id. Petitioner's reading of the new statute, Act § 104(3), App. at A168, as precluding review of state court judgments when the state court correctly cites the controlling case but misapplies the law, is untenable.

The plain language of the new statue provides that state court judgments are to be upheld unless the state adjudication

"resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." App. at A168. The "unreasonable application of" law standard is a permissive alternative to the better understood and less vague "contrary to" law standard. Id. A state judgment cannot stand if it is either contrary to law, or an unreasonable application of law. Id. Without resolving what is an unreasonable application of federal law, the state court judgment cannot stand if it is "contrary to" law. As set forth in the well-reaasoned opinions of both the Eighth Circuit and the U.S. Magistrate, the state court judgments were contrary to Strickland and Caldwell.[6]

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[6] One additonal ground in support of the judgment below is that the prosecutor's argument was an inaccurate statement of Missouri law. See Mo. Ann. Stat. § 565.006 (1979) (repealed 1984) (judge required to impose jury's sentence). Notwithstanding Missouri's general sentencing statute and the general sentence reduction rule, Mo. Rev. Stat. § 557.036 (Cum. Supp. 1984), and Mo. R. Crim. P. 29.05, the plain language of § 565.006 controls, because it is a specific, narrow provision applicable only to capital sentencing proceedings. See generally Appellee Driscoll's Petition For Rehearing By The Panel, Driscoll v. Delo, Nos. 94-2993 & 94-3266 (8th Cir.) (filed Jan. 2, 1996) at 7-14 (hereinafter "Driscoll's Reh'ng Pet.").

The Missouri Supreme Court's conclusion, that the prosecutor's argument was reasonable, was based on the purported ability of a state tral judge to reduce the sentence under Rule 29.05. App. at A128. In reaching this conclusion, which allowed the court to affirm the death sentence, the Missouri Supreme Court ignored the long established rule in Missouri along with specific controlling case that held the capital sentencing statute, § 565.006, to be a special creature not controlled by general sentencing provisions. See State ex rel. Eggers v. Enright, 609 S.W.2d 381, 383-84 (Mo. banc 1980). See generally Driscoll's Reh'ng Pet. at 7-14.

For that reason the Missouri Supreme Court's conclusion that the prosecutor's statements were accurate summaries of Missouri law has no fair or substantial support in state law and cannot provide a basis for denial of Driscoll's Caldwell claim. See,

73 F.3d at 706-13, App. at A8-A28; App. at A63-A70, A72-A85. Respondent does not argue otherwise, but instead argues only that the Missouri Supreme Court's findings or analysis were either "reasonable," or not "unreasonable." Pet. at 15, 17, 18.

Accordingly, grant of review in this case would serve no purpose, because application of the Act to Driscoll would not change the outcome of the case, nor explain how the Act might require a different standard of review than previously. If the Court desires a vehicle to resolve the question of whether the Act is applicable to cases decided before the Act's passage, it should choose not this case, but some other which involves a court of appeals ruling that is not defensible and offers the potential to illuminate fully the differences between the standard of review under the Act and its predecessor.

V. This Court Should Not Grant Review In This Case Because The State's Proffered Interpretation Of The New Habeas Statute Would Be Unconstitutional, Anyway, And Missouri Does Not Contend That This Case Was Incorrectly Decided Under The Old Habeas Statute.

To the extent that the State's understanding of new § 2254(d) deprives this court of the right to correct constitutional errors in wrong but not unreasonably wrong state court decisions, the State's recommended interpretation violates

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e.g., Howlett by and through Howlett v. Rose, 496 U.S. 356, 366 (1990); James v. Kentucky, 466 U.S. 341, 348-49 (1984); Barr v. City of Columbia, 378 U.S. 146, 149 (1964); Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938); Ward v. Love County Bd. of Comm'rs, 253 U.S. 17, 22 (1920); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 357-58 (1816). See generally Driscoll's Reh'ng Pet. at 4-7.

this Court's obligation to declare what the law is and to interpret the Constitution. U.S. Const., art. III, §§ 1 and 2.

The State's overly deferential formulation of § 2254(d)(1) also ignores the plain meaning of "contrary to law,"[7] and the myriad instances where federal courts have applied the phrase. The phrase does not limit federal review of state legal decisions to "arbitrariness," "clear error," "abuse of discretion," or any other attribute needed to overcome a presumption in the State's favor. Nor does the phrase establish such a presumption. The phrase simply tells the federal court to determine whether the state court "decision ... was contrary to ... Federal law."

In advocating an interpretation of new §2254(d) that requires Article III judges to defer to reasonable, but wrong, interpretations of federal constitutional law by state court judges, e.g., Pet. at 15-18, Missouri oversteps the limitations of the fundamental Article III principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

If Missouri's interpretation prevailed, and a federal court had to defer to state decisions that were "close enough" to federal law or not "unreasonably" in conflict with it, the rule in Marbury would be no more. Marbury's dictate is dispositive:

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[7] See Act § 104(3) (habeas relief to be granted only if the State adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law") (emphasis added).

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.... This is the very essence of judicial duty." Marbury, 5 U.S at 177-78. Accord Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2234 (1995) ("Congress may be free to establish a ... scheme that operates without court participation" but may not "instruct[] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate."); Plaut v. Spendthrift Farm, 115 S.Ct. 1447, 1453-55 (1995); United States v. Klein, 80 U.S. (13 Wall.) 128, 145-47 (1871).

Moreover, the deferential standard advocated by Missouri withdraws the very Article III obligation that discouraged this Court, in Wright v. West, 505 U.S. 277 (1992), from adopting its own rule of deference in habeas. As Justice O'Connor stated, concurring in the Court's decision to table the deference proposal, the Court has never

> held in the past that federal courts must presume the correctness of State court legal conclusions ... [n]or [has] a State court's incorrect legal determination ... ever been allowed to stand because it was reasonable. We have always held that Federal courts, even on habeas, have the independent obligation to say what the law is.

Id. at 305 (O'Connor, J., concurring).

As written, § 2254(d)(1) preserves the constitutionally essential control by Article III judges, but only so long as the Act is interpreted to allow them to embark on plenary review of state court legal determinations. There is no reason to interpret the Act otherwise. Accordingly, Missouri's unduly

deferential interpretation of the Act cannot apply, for it would render the Act unconstitutional under Article III.

Requiring less than the Court's best judgment on the effect of federal law would also violate the Due Process Clause. See Cooper v. Oklahoma, 116 S.Ct. 1373, 1383 (1996) (violation occurs when "principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" are offended). Plenary review is the unbroken tradition in this country when federal courts review state court legal judgments, including habeas judgments. Driscoll believes that there is no reviewing court in this country, state or federal, which has ever--in the context of reviewing applications of the Constitution to determine the rights of prisoners or in any other vaguely similar context-- conceded away the reviewing court's power of plenary review of the "legal," and particularly the Constitutional, determinations of the court whose determination is being reviewed. Adopting the State's deferential interpretation of the Act's standard of review uproots this fundamental principle of justice. It also violates due process.

Requiring less than the court's best judgment on the effect of federal law would also violate the Suspension Clause and improperly suspend the writ of habeas corpus. U.S. Const., art. I, § 9, cl. 2. This Court has repeatedly noted that "'there is no higher duty than to maintain [the writ of habeas corpus] unimpaired.'" Johnson v. Avery, 393 U.S. 483, 485 (1969) (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)). While one

might debate what claims have historically been cognizable in habeas corpous action, the scope of legal, as opposed to factual, review cannot be debated: it has been plenary since at least 1807. See, e.g., Ex parte Bollman, 8 U.S. (4 Cranch) 75, 114, 125, 135-36 (1807) (Marshall, C.J.) (describing scope of habeas review as "do[ing] that which the court below ought to have done," the Court "fully examin[es] and attentively consider[s]" whether probable cause existed for the challenged arrest); Moore v. Dempsey, 261 U.S. 86, 92 (1923) (Holmes, J.) (federal habeas judge has "duty of examining ... for himself [whether the facts], if true as alleged ... make the trial ... void"); Brown v. Allen, 344 U.S. 443, 506-07 (1953) (Frankfurter, J.) ("When ... the issue turns on basic facts ..., [u]nless a vital flaw be found in the process ..., the District Judge may accept the determination in the State proceeding," but when the case "calls for interpretation of the legal significance" of the historical facts, "District Judge must exercise his own judgment"); Miller v. Fenton, 474 U.S. 104, 112 (1985) (O'Connor, J.) ("an unbroken line of cases, coming to the Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that [a mixed question] merits something less than independent federal consideration").[8]

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[8] Moreover, if there were only one right provided by the original Constitution as a protection against federal abuses of power that the drafters of the Fourteenth Amendment intended to incorporate as a protection against state abuses of power, it was the right to routine and continuous access to the writ of habeas

For all of these reasons, application of the State's overly deferential interpretation of the Act's new § 2254(d) would violate the Constitution.

VI. In Any Event, The Antiterrorism And Effective Death Penalty Act Of 1996 Is Not Retroactive To Cases In Which The Court Of Appeals Had Issued Both An Opinion Disposing Of The Case And The Mandate.

On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "the Act"), Pub. L. No. 104-132, 110 Stat. 1214. See Edens v. Hannigan, 1996 WL 339763 *1 n.1 (10th Cir. June 20, 1996). The Act became effective when signed by President Clinton, see United States v. York, 830 F.2d 885, 892 (8th Cir. 1987), more than two months after the mandate of the Eighth Circuit issued on February 8, 1996. For a variety of reasons, the Act is not applicable to Driscoll's case.

The starting point in analyzing a statute to determine whether it is retroactive to cases pending at the time of its passage is the statutory language itself. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835, 110 S.Ct. 1570, 1575 (1990). "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film

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corpus save in time of war or rebellion. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873) (habeas is right of national citizenship protected by Fourteenth Amendment); Steiker, Incorporating the Suspension Clause: Is there A Constitutional Right To Federal Habeas Corpus For State Prisoners?, 92 Mich. L. Rev. 862 (1994).

Products, 114 S.Ct. 1483, 1497 (1994). See Kaiser Aluminum, 494 U.S. at 842-44, 855-56, 110 S.Ct. at 1579-81, 1586-87 (Scalia, J., concurring). A two-step test determines whether a statute applies to cases filed before it went into effect.

The first step is determination of Congress' intent. If Congress has "manifested an intent" with respect to the applicability of a statute to pending cases, Congress' intent controls. Landgraf, 114 S.Ct. at 1492. If Congress' intent may not be discerned, the "appropriate default rule" is "prospectivity," not retroactivity. Id. at 1501. See also id. at 1498 ("requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness"). Accordingly, unless Congress has made clear its intention to apply the statute retroactively, it must be given prospective effect. "Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent." Id. at 1499.

The second step in retroactivity analysis is to determine whether application of the statute to cases predating its enactment has a retroactive effect, i.e., "whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf, 114 S.Ct. at 1499.

Driscoll prevails under both steps. Congress' plain language clearly establishes that the Act was not intended to apply to Driscoll and other pending cases that predate the Act.

Moreover, the application of § 2254(d), as amended, would inequitably attach new consequences to preenactment events.

A. The Act's Plain Language Precludes Any Retroactive Effect Upon Driscoll's Case And All Those Other Habeas Cases Pending Prior To April 24, 1996.

Title I of the Act made two sets of revisions to the habeas statutes. The first set (the "Chapter 153 revisions") is in §§ 101-106 of the Act and modifies provisions in Chapter 153 of the Judicial Code governing all habeas cases. Included within the Chapter 153 revisions of the Act is the amendment of 28 U.S.C. § 2254(d), Act § 104(3), which the State contends changed the standard of review favorably in its favor. See Pet. at 15-18. The other set of habeas revisions added a new chapter to the Judicial Code (the "Chapter 154 revisions") and six new sections. Act § 107 (containing new provisions to be codified at 28 U.S.C. §§ 2261-2266). The Chapter 154 revisions shorten filing deadlines, limit cognizable claims and impose deadlines for judges' rulings. Act § 107 (to be codified at §§ 2262-2266). However, these new provisions apply only in capital cases, and only as a quid pro quo if the State provided the capital prisoner with competent counsel, funds for experts and other advantages during the state postconviction proceedings.[9] Id. (to be codified at § 2261).

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[9] As the State of Missouri did not satisfy the "opt in" preconditions for the applicability of this chapter, the Chapter 154 revisions are not applicable in this case.

Congress specifically considered the question of whether the new habeas provisions should apply in a case filed before they went into effect, but concluded that only "Chapter 154 ... shall apply to cases pending on or after the date of enactment of this Act." Act § 107(c) (emphasis added). Significantly, unlike Chapter 154, Congress did not call for the retroactive application of the Chapter 153 revisions, including those amending 28 U.S.C. § 2254(d), to previously filed cases.

The obvious explanation for Congress' omission of a retroactivity provision for the Chapter 153 revisions, especially given the inclusion of a retroactivity provision for Chapter 154, is that Congress intended to make the latter but not the former apply in previously filed cases. See Rodriguez v. United States, 480 U.S. 522, 525 (1987) ("where Congress includes particular language in one section of a statute, but it omits it in another section of the same Act, it is generally assumed that Congress acts intentionally in the disparate inclusion or exclusion") (citations and internal quotations omitted).

While a similar but opposite negative inference was not followed in Landgraf, the situation was entirely different. In Landgraf the petitioner sought to make retroactive the bulk of the Civil Rights Act of 1991 based on the negative inference of two minor provisions that provided for prospective statutory effect. 114 S.Ct. at 1494. Thus, the petitioner in Landgraf was swimming against the tide of centuries of jurisprudence that held in disfavor the retroactive application of legislation. Id. at

1497 & n.17. Cf. Kaiser Aluminum, 494 U.S. at 841 (Scalia, J., concurring) ("clear rule of construction ... since the beginning of the Republic, and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only").

In contrast, the negative inference drawn by Driscoll from the retroactive provisions of Chapter 154, Act § 107, is that the remainder of the Act, §§ 101-106, should receive prospective treatment. This Court's rejection of the use of a negative inference in Landgraf is inapt here, precisely because the negative inference here, unlike that in Landgraf, is fully in accord with the historical presumption against retroactivity.

Thus, the negative inference, from Congress' limited provision of retroactive effect for the Chapter 154 revisions, supports prospective application of the Chapter 153 revisions. Moreover, this is not the only basis for Driscoll's contention that the Act does not apply to his or other pre-Act cases. There is more compelling evidence in the plain language of the Act, language which points inexorably to prospective application of Chapter 153.

Another venerable rule of construction prescribes that every word of a statute be given full meaning and effect if at all possible, and militates against interpretations that "read out," make redundant or ignore statutory language. See, e.g., Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 837 & n.11 (1988); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803)

(court should not read statutes to contain "surplusage, entirely without meaning"). Because parts of the Chapter 154 revisions become redundant if Chapter 153 were to apply retroactively, this court should construe the Act to effectuate both chapters of Title I, by recognizing Congress' intent that Chapter 153 be given prospective application only.

If Chapter 153 were given retroactive effect, it would render entirely redundant two Chapter 154 provisions. New § 2261(a) provides that the Chapter 154 provisions shall be applicable only in cases "arising under section 2254." New § 2264(b) requires district judges, in adjudicating Chapter 154 cases, to apply revised § 2254(d) and (e), both of which were added by the Act in Chapter 153, Act § 104(3) and (4). This provision is entirely redundant of § 2261(a) (Chapter 154 applies to cases arising under § 2254) unless the Chapter 153 revisions, including the amendment of § 2254, do not apply of their own force to pending cases.

Section 107(c) of the Act makes only "Chapter 154 ... apply to cases pending ... on the date of enactment," but omits Chapter 153 from its pronouncement of retroactivity. As none of the Chapter 153 revisions apply of their own force in previously filed cases, the only way to make some of them apply in the previously filed (capital) cases that are covered by Chapter 154 would be to incorporate the relevant sections by reference into Chapter 154. That is § 2264(b)'s precise function--to allow the newly revised § 2254(d), Act § 104, to apply in the few pending

cases to which Chapter 154 applies retroactively. Were revised § 2254(d) already applicable to all pending cases, as the State of Missouri argues here, Pet. at 12-13, there would be no need to specify that those same sections were applicable in adjudicating Chapter 154 cases under new §2264(b).

Based on the strong presumption of non-retroactivity, the Act's limited prescription of retroactivity to a small portion of habeas cases, and the Act's necessary implication that Chapter 153 is not retroactive when giving effect to all of the Act's provisions, the statute's plain language establishes Congress' intent not to apply Chapter 153 retroactively. This result is sensible, as well, because the Act uses Chapter 154's retroactive application to reward qualifying states that previously gave procedural safeguards to the capital prisoners to whom Chapter 154 applies, and because those advantages make a quicker trip through the federal courts both practical and fair in cases filed before enactment.

Unsurprisingly, of the courts that have addressed the issue, both Circuit Courts of Appeals and the vast majority of District Courts have concluded that Chapter 153 of the Act is not applicable to pending cases. See, e.g., Edens v. Hannigan, 1996 WL 339763 at *1 n.1 (10th Cir. June 20, 1996); Williams v. Calderon, 83 F.3d 281, 285 (9th Cir. 1996); Wilkins v. Delo, No. 91-0861 CV-W-5, slip op. at 2-6 (W.D. Mo. May 15, 1996); Warner v. United States, 1996 WL 242889 at *9 (E.D. Ark. May 10, 1996); United States v. Gilmore, 1996 WL 243047 at *3 (N.D. Ill. May 9,

1996); Austin v. Bell, 1996 WL 284882 at *1-3 (W.D. Tenn. May 9, 1996); Schlup v. Bowersox, No. 4:92CV443 JCH, slip op. at 20 (E.D. Mo. May 2, 1996). See also Centanni v. Washington, 1996 Wl 251438 (N.D. Ill. May 8, 1996) (expressing doubts about retroactivity, but not deciding the issue). But see Leavitt v. Arave, 1996 WL 291110 (D. Idaho May 31, 1996) (finding Act retroactive). This Court should likewise find the Act is not retroactive to pending cases.

B. The Act May Not Be Retroactively Applied To Driscoll's Habeas Petition Because It Would Attach New Legal Consequences To Actions Taken Before The Act Was Enacted.

Assuming arguendo that the standard of review under the old and new habeas statute is, in fact, different, the Act could not apply to Driscoll because it would attach new legal consequences to actions taken before the Act was enacted. The State argues for the Act's retroactive application to pending cases, Pet. at 13, notwithstanding the Act's plain language, on the ground that the Act regulates "secondary rather than primary conduct." It is true that some of this Court's decisions have characterized habeas corpus review as "secondary" and more limited than direct appeal review, e.g. Lonchar v. Thomas, 116 S.Ct. 1293, 1306-07 (1996) (Rehnquist, C.J., concurring) (asserting that petitioner's dilatory course of conduct in habeas proceedings will not entitle him to delay execution, given secondary and limited scope of federal habeas review). Cf. Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983). That does not mean that the right of habeas

corpus is a secondary right or that pursuit of that right is "secondary conduct." See U.S. Const., art. I, § 9, cl. 2 ("Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it").

The secondary and limited scope of review of the writ of habeas corpus is, of course, restricted to U.S. Constitutional issues, and then, only after another court, state or federal, has already reviewed the case and found no violation. Understood in this context, it is understandable that inequitable conduct by a petitioner, who unreasonably seeks only to delay execution of his sentence and not resolution of a non-frivolous, Constitutional issue, may dis-entitle him to the procedural and substantive protections governing consideration and disposition of habeas petitions.[10] See Lonchar, 116 S.Ct. at 1307 (citing Barefoot).

However, because the Act attaches "new legal consequences to events completed before its enactment," the Act cannot be given retroactive effect even if it regulated secondary conduct, which it does not.[11] Cf. Landgraf, 114 S.Ct. at 1499. The State would

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[10] However, this is not a case where a habeas petitioner has filed an eleventh-hour, first habeas petition, or a successive or abusive petition; nor has Driscoll otherwise engaged in inequitable conduct aimed at the indefinite delay of the State's right to carry out its sentence. See Habeas Rule 9. Cf. Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983).

[11] For example, the Missouri Supreme Court and lower Missouri courts have already ruled on the merits of Driscoll's claims and made some, but conceivably not all, relevant factual determinations that presumably are supported by the underlying state records. Those courts are now closed to Mr. Driscoll. He

deprive Driscoll of his constitutional right to pursue the writ of habeas corpus by retroactively changing the rules in the middle of the game. Fortunately for him, the Constitution and the retroactivity principles established by this Court will not allow it.

Essentially, by seeking to impose the Act retroactively upon Driscoll, the State must contend that under the revised habeas statute, first, Driscoll has received "fair notice"; second, that he cannot show "reasonable reliance" on prior actions of his, the State and the courts during direct and collateral review of his conviction and death sentence; and third, that he has no "settled expectation[]" in review of the constitutionality of the conviction and death sentence via the writ of habeas corpus. See Landgraf, 114 S.Ct. at 1499. Cf. U.S. Const. art. I, § 9, cl. 2 ("Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"). See also Lonchar v. Thomas, 116 S.Ct. 1293, 1298 (1996) (writ of habeas corpus demands "application of basic

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cannot go back and ask for further findings of fact or law. Driscoll had no reason to do so years ago when the determinations were made, as he obtained merits rulings that effectively gave him the right to full and independent review of his constitutional claims in federal court.

Principles of fairness and reliance preclude the Act's application of a new, deferential standard of review to these actions taken years ago by Driscoll and the courts. "The presumption against statutory retroactivity," is so strong that it operates even when retrospective application "would vindicate [the statute's] purpose more fully" and when the rule attaching new consequences to events that antedated the Act is "procedural" rather than substantive. Landgraf, 114 S.Ct. at 1507-08, 1502 n.29, 1505 n.34; id. at 1524-25 (Scalia, J., concurring).

constitutional doctrines of fairness"); id. at 1300 (recognizing "the important right of those raising serious habeas questions to have their claims thoroughly considered by the district court"). Under the circumstances of this case, retroactive application of the Act's new provisions for procedural deference to State determinations of fact and law operates to attach new legal consequences to actions taken by Driscoll prior to the passage of the Act.

Under any and all of Landgraf's formulations of a "genuinely 'retroactive,'" and hence, inapplicable, statute, 114 S.Ct. at 1503, new § 2254(d)'s spotlight on prior adjudicative and decisional behavior of state courts--which in this case occurred at least five years before enactment--qualifies it as retroactive: The statute "attaches a new disability[] in respect to transactions or considerations already past," 114 S.Ct. at 1499; it "changes the legal consequences of acts completed before its effective date," id. at 1498 n.23; it "gives a quality or effect to acts or conduct which they did not have ... when they were performed," id.; it is "quintessentially backward-looking," id. at 1506; "the relevant activity that the rule" considers did not "occur after the effective date of the statute," id. at 1524 (Scalia, J., concurring) (all citations omitted).

Accordingly, the Act cannot be retroactively applied to Driscoll.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was placed in the United States mail, postage prepaid and properly addressed to: Stephen D. Hawke, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, and the Solicitor General Of the United States, Room 5614, Department of Justice, 10th St. & Constitution Ave. N.W., Washington D.C. 20530, this 17th day of July, 1996.

Bruce D Livingston

(3)

No. 95-1779

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

ROBERT DRISCOLL,
A State Prisoner Under Capital Sentence,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether respondent is entitled to a writ of habeas corpus under 28 U.S.C. § 2254(d) (approved April 24, 1996) where the state courts' resolution of respondent's claims was reasonable?

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RESPONDENT IS NOT ENTITLED TO A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(D) (APPROVED APRIL 24, 1996) BECAUSE THE STATE COURTS' RESOLUTION OF RESPONDENT'S CLAIMS WAS REASONABLE.

After the Court of Appeals' decision affirming the district court's grant of the writ of habeas corpus (Appendix A-1), Congress passed and the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (Act). Pub. L. 104-132, 110 Stat. 1217. The petition for *writ of certiorari* requests the Court to remand the cause to the Court of Appeals for reconsideration in light of the Act. That approach has been used again and again by this Court in similar circumstances. *See*, e.g., **Hicks v. Brown Group**, 503 U.S. 901 (1992) (granting writ and remanding cause for further consideration in light of the Civil Rights Act of 1991); **Holland v. First Virginia Banks**, 502 U.S. 1086 (1992) (same); **Gersman v. Group Health Assoc.**, 502 U.S. 1068 (1992) (same). None of the arguments presented by respondent in his brief in opposition (hereinafter "BIO") demonstrate that the Court should take another approach in this case.

Instead, respondent suggests that *certiorari* is improvident since § 104 of the Act continues to authorize *de novo* review of legal issues by the federal court in considering a petition for writ of habeas corpus (BIO p. 11). But that construction of the Act is erroneous. Amended 28 U.S.C. § 2254(d)(1) allows no deference to the state-court ruling only where the state-court decision "was contrary to, or involved an unreasonable application of, clearly-established federal law, as determined by the Supreme Court of the United States" (A-168). The "contrary to clearly-established federal law" provision

does not continue the former standard of *de novo* legal review; otherwise, the remaining language of § 2254(d)(1), the "reasonable application" standard, would never be examined.

The "contrary to clearly-established federal law" provision should be implicated only in truly egregious situations. For example, a state-court declaration that there were no Sixth and Fourteenth Amendment rights to counsel at trial would be "contrary to clearly-established federal law," or, if a state court were to require a criminal defendant to sustain the **Swain** burden of proof instead of the **Batson** burden of proof in a trial conducted after 1986, then that decision would be contrary to clearly-established federal law. *Compare* **Batson v. Kentucky**, 476 U.S. 79 (1986) *with* **Swain v. Alabama**, 380 U.S. 202 (1965). Phrased a little differently, a state-court decision is "contrary to clearly-established federal law" only if the state court applied federal constitutional law other than that "dictated by precedent existing at the time the defendant's conviction became final." **Teague v. Lane**, 489 U.S. 288, 301 (1989). A federal court's mere disagreement with the state court's application of federal law is a far cry from the standard now imposed by law: that the state court's decision was either contrary to clearly-established federal law or involved in unreasonable application of clearly-established federal law.

Applying this standard to the present case, in resolving the ineffective assistance of trial counsel claim, the Missouri Supreme Court found neither a breach of duty nor resulting prejudice under the **Strickland v. Washington**, 466 U.S. 68 (1984) standard (A-140-41; A-153-54). Likewise, the Eighth Amendment issue was resolved by the Missouri Supreme Court during

respondent's direct appeal on the basis of **Caldwell v. Mississippi**, 472 U.S. 320 (1985) (A-128-29). The state courts' resolution of respondent's claims cannot be described as "contrary to clearly-established federal law." Rather, as petitioner noted in the petition (Petition, pp. 15-16, 17, 17-18), the state court's analysis was a reasonable application of clearly-established federal law. The respondent, who is entitled to no habeas corpus relief under the new Act, offered no response.

In Sections V and VI of respondent's brief in opposition, respondent contends that application of the deference requirement in 28 U.S.C. § 2254(d)(1) violates the Suspension Clause in Art. I, § 9, clause 2 of the Constitution (BIO pp. 15-16), Art. III of the Constitution (BIO, pp. 13-14), and the Due Process Clause of the Fourteenth Amendment (BIO p. 15). Respondent also contends that the Act should not apply to cases pending at the time the Act became effective (BIO pp. 17-27). These are issues that can be decided not in considering a petition of certiorari, but by the Court of Appeals on remand. Alternatively, they are good issues for certiorari review in and of themselves. But they do not justify affirming the pre-Act judgment of the Court of Appeals.

Respondent contends that the deference requirement in 28 U.S.C. § 2254(d) undermines the Court's Article III powers to say what the law is (BIO, pp. 13-14). His assertion misses the mark. The reform contained in § 2254(d) requires the federal courts to defer to reasonable state-court resolution of claims. It is untenable to argue that principles of *res judicata* and *collateral estoppel* that are now enforced by the Act somehow undermine Art. III of the Constitution. No one can seriously contend that Art. III prohibits enforcement of

those finality principles with litigation under 42 U.S.C. § 1983 or with any other form of litigation.

Respondent contends that the deference requirement of 28 U.S.C. § 2254(d)(1) violates the Due Process Clause of the Fourteenth Amendment (BIO p. 15). Again, the true issue is what effect the state courts' judgment should have. Respondent refers the Court to no precedent to support the proposition that the Due Process Clause regulates the scope of the writ of habeas corpus, a collateral proceeding in federal court concerning the lawfulness of custody. In any event, notions of fundamental fairness are not offended by a state court's reasonable application of the federal Constitution.

Finally, concerning the suspension-clause issue (BIO pp. 15-16), assuming the clause applies to prisoners in state custody, *see* **Felker v. Turpin**, 116 S.Ct. 2333, 2340 (1996)--an issue that is worthy of *certiorari* review in and of itself, *see* **Id.**, citing **Swain v. Pressley**, 430 U.S. 372 (1977)--28 U.S.C. § 2254(d)(1) merely regulates the writ availability when claims are litigated in state court. This provision of the Act is within the compass of the evolutionary process of the writ of habeas corpus described in **Felker v. Turpin**. Id.

Respondent's final contention is that the deference provision of 28 U.S.C. § 2254(d)(1) is not applicable to cases pending when the Act became effective on April 24, 1996 (BIO pp. 17-27). Respondent acknowledges the diverse opinions by the lower courts concerning this issue (BIO pp. 23-24). *See* **Cockrum v. Johnson**, 1996 WL 425563, at p. * 3 (E.D. Tex. July 25, 1996) (discussing diverse positions of the lower courts). Of the cases cited by respondent, however, only one

deals with the amendment to § 2254(d), and that opinion determines that the reform provision applies to pending cases. **Leavitt v. Arave**, 927 F. Supp. 394, 397 (D. Idaho 1996). The court below, the United States Court of Appeals for the Eighth Circuit, has not decided the applicability of the Act to cases pending on April 24, 1996, but it has hinted in *dicta* that it is applicable. **Feltrop v. Bowersox**, No. 93-2738, slip op. at 3 n.2 (8th Cir. Aug. 8, 1996).

Petitioner suggests that since § 107 of the Act containing 28 U.S.C. §§ 2261-66 contains a provision applying those statutes to pending capital cases, the lack of a provision in §§ 101-106 of the Act means that Congress did not intend that set of revisions to be applied to pending cases (BIO pp. 19-24). The Court rejected such use of negative inferences in **Landgraf v. USI Film Products**, 114 S.Ct. 1483, 1494 (1994). And the express provision for Chapter 154 was necessary to ensure that states who opted in under 28 U.S.C. § 2261 at a time after April 24, 1996, receive the benefits of that chapter for their pending cases. **Leavitt v. Arave**, 927 F. Supp. at 398.

In the petition for writ of certiorari, petitioner suggested that 28 U.S.C. § 2254(d) applied to pending cases since the provision regulated secondary rather than primary conduct (Petition for Writ of Certiorari, pp. 12-13). Respondent agrees that habeas corpus review is procedural in nature and regulates secondary conduct (BIO pp. 24-25). Further, the statute regulates the availability of prospective relief. A writ of habeas corpus is a form of injunctive relief against a state custodian--a situation where a modified statute applies retrospectively. **Landgraf v. USI Film Products**, 114 S.Ct. at 1501. In fact, due to the Eleventh Amendment, the writ's

exclusive focus on prospective relief is constitutionally based.

Finally, respondent notes a hostility by the lower courts to the retrospective application of the Act (BIO pp. 23-24 (collecting cases)). Concerning the retrospective application of 28 U.S.C. § 2254(d) (effective April 24, 1996), the Court of Appeals for the Second Circuit has rejected retrospective use of this provision; however, the analysis of the Circuit Court does not discuss in detail the issues presented by this Court in **Landgraf**. *See* **Boria v. Keane**, 996 U.S.L.W. 397290 (2d Cir. July 17, 1996). In light of the hostility by the lower courts to the retrospective application of the Act, this case gives an early opportunity to correct this attitude.

CONCLUSION

For the prevailing reasons, petitioner prays the Court issue a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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